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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CRANE NECK ASSOCIATION, INC.; ARTHUR L. DOUGLAS, JR.; CATHERINE CHILDS; EVERSLEY CHILDS ODGEN; MARGHERITA A. FIDAO; CHARLES H. COPELAND; ARTHUR WEEKS and RUTH WEEKS; KEVIN HANLON and JO ANN HANLON; MARION HOMIRE; HIROSHI TAKAHASHI and YOSHIKO TAKAHASHI; PHILIP ERHORN; LAWRENCE FORSDICK and NANCY FORSDICK; CHARLES A. FORSDICK; ARTHUR BELDER; ARTHUR R. FORSDICK; RENATTE HAKIM-ELAHI; ROBERT GORDON and IDA GORDON; H. WILLARD GRAY and BARBARA GRAY; HARVEY KRAMER; CHARLES WURSTER and EVA WURSTER; SHERRI ANN TISCH; H. TREBLING BURNARD and MARGARET BURNARD; ARTHUR AUFSES and HARRIET AUFSES; JANE PERKINS; WILLIAM MILHAVEN and BARBARA MILHAVEN; DOROTHY GRAF; JAMES HURLEY and HELENE HURLEY; BRUCE SULLIVAN and MARGARET SULLIVAN; ANNA L. HARTZELL; MAXIME C. FIDAO; WALTER EICHACKER and JANET EICHACKER; YANG S. LU and GRACE LU,

Appellants,

—against—

NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellees.

JURISDICTIONAL STATEMENT

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Questions Presented

1. Does Article I, Section 10, Clause 1 of the United States Constitution permit a state to enact and enforce a statute overriding longstanding deed covenants and restrictions limiting real property to single family use and to lease and use property subject to such restrictions as a "community residence" for eight mentally retarded adults and their attendants?

2. Where longstanding deed covenants and restrictions limited real property to single family use, did New York State deprive property owners benefited by those covenants of valuable property rights without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, when it leased and used restricted real property as a "community residence" for eight mentally retarded adults and their attendants?

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ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

Forty-five homeowners and the Crane Neck Association Inc., their homeowners' association, appeal from the judgment of the New York Court of Appeals rendered February 23, 1984, which declined, on the basis of §41.34(f) of the State's *Mental Hygiene Law* (McKinney 1978), to enforce against NYC/Long Island County Services Group (the "Agency"), New York State Department of Mental Retardation and Developmental Disabilities, (the "Department"), and Jonathan Pool and Bernard Grofman, owners of the property at bar, recorded covenants and restrictions which, since 1945, had restricted 500 acres of land, including the Pool-Grofman property, to single family use. The Agency and Department are instrumentalities of the State of New York, charged by state law with responsibility for locating appropriate sites for the establishment of community residential facilities for from six to fourteen mentally disabled individuals and their attendants.

Opinions Below

The opinion and judgment of the New York State Court of Appeals, reported at 61 N.Y.2d 154 (1984), appear at Appendix pages 26a to 42a. The opinion of the New York State Appellate Division, Second Department, reported at 92 A.D.2d 119, 460 N.Y.S.2d 69 (1983), appears at Appendix pages 11a to 25a. The opinion of the Suffolk County Supreme Court at Special Term is not reported, and appears on pages 1a to 10a in the Appendix.[1]

Jurisdiction

The judgment of the New York State Court of Appeals was filed February 23, 1984 (42a). Within 90 days of the judg-

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[1]References to pages of the appendix will be noted as (a).

ment, and on May 9, 1984, notice of appeal to this Court was served upon the attorneys for the appellees, and on May 10, 1984 duly filed in the Court of Appeals and in the Supreme Court of the State of New York (the court possessed of the record) (44a). On May 15, 1984, Justice Marshall extended appellants' time to docket this appeal to July 2, 1984 (48a), and the appeal is being docketed in this Court within the time as so extended.

The Court's jurisdiction is invoked under 28 U.S.C. §1257 (2). If the Court should for any reason deem jurisdiction to be lacking, appellants respectfully pray that the Court treat this appeal as a petition for certiorari pursuant to 28 U.S.C. 1257 (3), *Garrity* v. *State of New Jersey,* 385 U.S. 493, 87 S.Ct. 616 (1967), and grant certiorari to review the judgment of the Court below.

Constitutional Provisions and State Statutes Involved.

Article I, Section 10, United States Constitution:

> No State shall . . . pass any . . . law impairing the obligation of contracts. . . .

Fifth Amendment, United States Constitution:

> . . . nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1, United States Constitution:

> . . . nor shall any State deprive any person of . . . property, without due process of law. . . .

Section 41.34(f), New York *Mental Hygiene Law* (McKinney 1978):

> A community residence established pursuant to this section and family care homes shall be deemed a family unit, for purposes of local laws and ordinances.

Statement of the Case

In 1902, Eversley Childs purchased 500 acres of land on Crane Neck, a peninsula on the north shore of Long Island surrounded on three sides by the waters of Long Island Sound. In the 1930's, Childs conceived of a plan to develop the entire tract as a luxury development of single family homes to be known as "Crane Neck Farm." Beginning in 1945, pursuant to a common plan of development, Childs imposed identical deed restrictions upon all parcels comprising the tract, limiting each parcel to single family residential use. By 1955, all of the lands comprising Crane Neck Farm, including the 2.3 acre parcel ultimately acquired by appellees Pool and Grofman, were both benefited and burdened by this deed restriction.

In 1967, the New York State Legislature authorized initiation of a community residence program. The purpose of the program was to deinstitutionalize mentally disabled persons and enhance their opportunity to lead constructive and fruitful lives.

In 1978, the Legislature enacted the "Padavan Law" [now codified as §41.34 of New York *Mental Hygiene Law* (McKinney 1978)] for the express purpose of overriding local zoning laws and ordinances limiting land to single family use,[2] so that those laws and ordinances would not impede the establishment of community residences by the State and its agencies. In addition to providing that "a community residence established pursuant to this Section . . . shall be deemed a family unit, for purposes of local laws and ordinances," the Padavan Law provided for consultation with local units of government with regard to site selection for such facilities. The power to determine their location was, however, reserved to the State.

In 1972, appellees Pool and Grofman acquired title to a

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[2]Memorandum of Governor Hugh L. Carey, July 6, 1978, approving Laws of 1978, Ch. 468, McKinney's Session Laws of New York, 1978, p. 1821.

single family residence on 2.3 acres of land, within the Crane Neck Farm development. In August 1979, the appellee State agencies, which were responsible for locating sites for community residences and for their establishment, notified the local municipality, the Incorporated Village of Old Field, of their interest and intent to establish such a residence at the Pool-Grofman property. The Village Trustees held a public hearing on the question and immediately thereafter advised the State of the extremely strong objections of the Village and its residents to such a facility at the proposed location. In this connection, the Village specifically advised the State of the existence of the restrictive covenant which prohibited use of the subject property for other than single family residential purposes.

The appellee agencies conducted their own public hearing, and in December 1979 the Commissioner of appellee Department overruled the objections of the Village and approved the subject property for the establishment of a community residential facility. A lease was negotiated and executed between the State and the property owners, who were then residents of the States of Washington and California, and the State entered into possession on or about September 1, 1980, the effective date of the lease. At present, eight unrelated and profoundly mentally retarded adults and three attendants reside on the premises, receiving care and services as provided by state law.[3]

Several weeks after the effective date of the lease, 48 area residents, owning property burdened and benefited by the same covenant and restriction, together with their homeowners' association (a not-for-profit corporation), commenced this suit in the New York Supreme Court, seeking a declaration that the State's use of the subject property violated the restrictive covenant, and a permanent injunction against such use.

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[3]The three attendants consist of two "houseparents" and one aide. Additionally visiting the premises, apparently on a regular basis, are a dietician, a nurse, a psychologist, a social worker, a recreation therapist, and other specialists as needed.

The appellees asserted that use of the subject property as a community residence did not violate the restrictive covenant, because the mentally retarded residents and their attendants and "houseparents" were analogous to dependent children and parents in a single biological family. Appellees also argued that enforcement of the restrictive covenant would be contrary to the State's strong public policy with regard to the establishment of such facilities.

It was also asserted that the appellants were estopped to enforce the covenants since a number of residents in the area (including Pool and Grofman) had allegedly for some years permitted unrelated persons not constituting a single biological family to occupy properties encumbered by the covenant.

Raising the Federal Questions

Appellants claimed in their initial pleading that the action of the State pursuant to the Padavan Law had impaired the obligation of contracts contrary to Article I, Section 10, Clause 1 of the United States Constitution, and also amounted to a taking of the appellants' property rights in the restrictive covenant without just compensation, in violation of the taking clauses of the Fifth and Fourteenth Amendment to the United States Constitution.

The Supreme Court granted partial summary judgment to the appellants, holding that the covenant was violated by the State's activity, but reserved for trial the question of whether appellants were estopped to seek equitable relief. The appellees appealed to the Appellate Division of the Supreme Court, which reversed and dismissed the complaint, holding that those residing on the subject property were the functional equivalent of a biological family and that enforcement of the covenant was also precluded by State public policy.

The appellants appealed to the Court of Appeals, which re-

jected the Appellate Division's holding that the residents in the facility constituted a "family," saying —

> . . . a home inhabited by eight unrelated adults each receiving uninterrupted professional supervision and care is not a single family unit. . . . The residence being operated by respondent agencies within Crane Neck, then, cannot be considered a single family dwelling as contemplated by the deed restriction.

However, the Court of Appeals affirmed the Appellate Division determination on public policy grounds, holding that §41.34 (f) of New York *Mental Hygiene Law* (McKinney 1978), though not expressly applicable to restrictive covenants, was intended by the Legislature to "eliminate the legal challenges that were impeding implementation of the State policy" of establishing community residential facilities for mental patients. The Court held that

> Private covenants restricting the use of property to single family dwellings pose the same deterrent to the effective implementation of the state policy as the local laws and ordinances that had actually been the subject of the legal challenges. Given the avowed purpose of this law, we conclude that the legislature did not enact subdivision (f) to erase the impediment resulting from single family requirements found in laws and ordinances while leaving it intact in private covenants, and that the subdivision applies to such deed restrictions as well.

Finally, citing this Court's decisions in *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, ____ U.S. ____, 103 S.Ct. 697 (1983) and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 98 S.Ct. 2716 (1978), the Court of Appeals expressly recognized that by permitting a legislative enactment to override and impair a contractual obligation, it was necessarily implicating the Contract Clause of the federal Constitution. However, it rejected the appellants' Contract Clause arguments on the ground that

> the State's interest in protecting the welfare of mentally and developmentally disabled individuals is clearly an important public purpose, and the means used to select the sites for community residences are reasonable and appropriate to effectuate the State's program of providing the most effective care in the least restrictive environment. In such circumstances, appellants' private contract rights may not override state policy.

The State courts did not address appellants' Fifth and Fourteenth Amendment taking arguments.

In a brief *amicus curiae*, the New York State Commission on the Quality of Care for the Mentally Disabled supported the appellees' position, noting that Indiana, Wisconsin and North Carolina had enacted statutes similar in purpose to §41.34(f), but which expressly overrode private restrictive covenants. The State Commission also argued that New York was under federal constraints to deinstitutionalize mental patients by virtue of the consent decree in the "Willowbrook" case [*New York State Association for Retarded Children* v. *Carey*, 393 F.Supp. 715 (EDNY 1975)] and the judgment of the federal court in *Society For Good Will To Children* v. *Cuomo*, 572 F.Supp. 1300 (EDNY 1983)[4]. The Commission also pointed to an alleged federal policy of deinstitutionalizing mental patients, as expressed in *Pennhurst State School* v. *Halderman*, 451 U.S. 1,

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[4]In "Willowbrook," the District Court approved a *consent* decree under the terms of which the State bound itself to "develop and operate a broad range of non-institutional communities and programs to meet the needs of Willowbrook's residents and the class." The basis of the decree was an asserted "constitutional right to protection from harm." In light of the Second Circuit's recent reversal of the District Court determination in *Good Will*, [*Society for Good Will to Retarded Children* v. *Cuomo*, Nos. 83-7621 and 83-7663 (decided June 13, 1984)], it is doubtful that the State would now enter into a consent decree containing the same terms as those in the "Willowbrook" decree. In *Good Will*, the Second Circuit held that there is "no constitutional right to community placement."

101 S.Ct. 1531 (1981) and *People* v. *11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982).[5] None of these cases, however, required establishment of community residential facilities on properties affected by restrictive covenants.

This appeal seeks review of the Court of Appeals decision and judgment dated February 23, 1984.

The Questions Are Substantial

Restrictive covenants encumber a relatively small portion of lands in private ownership in New York State. With the growth of zoning ordinances, the practices of restricting land use by deed restrictions fell into disuse. See 1 Anderson, New York Zoning Law & Practice. §1.04 (2d Ed. 1973). Thus, the State's deinstitutionalization program does not depend for its success upon overriding private deed restrictions.

Restrictive covenants (other than those imposed to memorialize a grantor's racial or religious biases) have never been condemned by either the federal or New York courts. No case has ever declared them to be against public policy until the decision of the Court of Appeals in this case, and that decision merely declared these covenants to be unenforceable by virtue of a public policy not adopted until several decades after the imposition of the deed restrictions.

The State cannot reasonably contend that the restriction in question substantially impedes implementation of its state-wide program. It can merely argue that any impediment, however

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[5]In *Pennhurst*, contrary to the position of the *amicus*, this Court held that 42 U.S.C. §6010 did not create substantive rights in favor of the mentally retarded or an obligation on the part of the states to provide, at their own expense, certain types of treatment. In *11 Cornwell*, the Second Circuit affirmed a District Court judgment, rendered upon a pendent state law claim, against neighbors who conspired to purchase a dwelling which had been intended for use by the State as a community residence for mentally retarded persons.

slight, to the effectuation of a beneficial and important state policy, must fall, even though the particular public policy was not in existence at the time the covenant was imposed. What the State is really saying is: Contracts entered into in unquestioned good faith may retroactively be invalidated decades later by a change in public policy. Such a doctrine would make a shambles of the expectations of any contracting party, now or in the future.

Moreover, the State should in no event be permitted to impair the obligation of contracts upon the ground that federal policy now allegedly favors deinstitutionalization of mental patients, in the absence of any express federal policy or enactment requiring the establishment of community residential facilities in contravention of restrictive covenants affecting the properties concerned. There is no such federal requirement, and a federally mandated facility overriding private deed restrictions, would raise grave Constitutional questions under the Fifth and Fourteenth Amendment Taking Clauses.

The appellees contend that private property owners could thwart public policy by the simple expedient of making a private contract among themselves prohibiting whatever policy the State might wish to implement at any time in the future. This was the concern of Mr. Justice Holmes in *Hudson Water Co.* v. *McCarter,* 209 U.S. 349, 357, 28 S.Ct. 529, 531 (1908). However, longstanding contracts having a beneficial (or at least, innocuous) purpose, and which were not entered into in the face of an announced intention on the part of the State, for example, to establish residential facilities for mental patients, either in a specific area or in residential areas generally, are clearly different from covenants entered into to evade or thwart an existing beneficial and important state policy. The latter would not only be suspect in motivation, but would involve entirely different expectations than covenants innocently entered into decades before the establishment or announcement of any change in state policy.

If New York's judgment stands, it is difficult to imagine what vitality would remain in the Contract Clause. No contractual provision could safely avoid retroactive invalidation by running afoul of a subsequently adopted public policy. It is important to note in that connection that three states[6] in addition to New York have enacted statutes that expressly abrogate restrictive covenants. An affirmance here would sanction the impairment of contract rights long relied upon by parties having no reason to anticipate any future inimical state policy.

In recent years this Court has breathed new vitality into the Contract Clause, as contrasted with a historical period during which the constitutionality of state legislation was measured by standards established under the due process clause of the Fourteenth Amendment. To permit the decision below to stand as precedent would be tantamount to abandoning all of this Court's recent pronouncements on the subject, commencing with *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 97 S.Ct. 1505 (1977), and ending with *Energy Reserves Group, supra.*

We additionally submit that the State's action in leasing rather than condemning the subject property constitutes a violation of the Taking Clauses of the Fifth and Fourteenth Amendments. Contract rights are a form of property and may be taken away by the states only if just compensation is paid. *U.S. Trust Co., supra; Pennsylvania Hospital* v. *City of Philadelphia*, 245 U.S. 20, 38 S.Ct. 35 (1917). If the State deprives a private citizen of his property, it must justly compensate the individual or an impermissible taking of private property under the Fifth and Fourteenth Amendment has occurred. *Loretto* v. *Teleprompter*, ____ U.S. ____, 102 S.Ct. 3164 (1982); *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 100 S.Ct. 383 (1979).

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[6]Indiana [Ind. Code Ann. §16-10-2.1-6.6 (Supp. 1981)]; North Carolina [N.C. Gen. Stat. §168-23 (Cum. Supp. 1981)]; and Wisconsin [Wis. Stat. Ann. §46.03 (22) (d) (West 1979)]. Indiana repealed its statute in 1983. P.L. 197-1983, Sec. 7, effective September 1, 1983.

New York, as evidenced by the holding of its highest court, has extinguished the appellants' rights under the restrictive covenant, and cannot constitutionally do so without justly compensating them and all other property owners detrimentally affected by this taking.

For these reasons, the federal questions presented are substantial.

Summary of contract clause claims: state action abrogating deed restrictions not proscribed by public policy at the time they were imposed violates the contract clause.

The Contract Clause of the United States Constitution is not now, nor has it ever been, a dead letter. *Allied Structural Steel Co., supra,* 438 U.S. at 241, 98 S.Ct. at 2721 (1978). See, Note, *Process — Oriented Approach to the Contract Clause,* 89 Yale L.J. 1623 (1980). In the present case, the New York Court of Appeals has held that the State's total destruction of a private contract right embodied in a valid and binding deed restriction is *ipso facto* justified by a legitimate public policy implemented by a state statute. Such a sweeping pronouncement runs counter to the *caveat* recently posted by this Court:

> If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of the State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.

Allied Structural Steel Co., supra, 438 U.S. at 242, 98 S.Ct. at 2721.

Although the absolute language of the Contract Clause must leave room for "the essential attributes of sovereign power, . . . necessarily reserved by the states to safeguard the welfare

of their citizens", *United States Trust Co., supra,* 431 U.S. at 21, 97 S.Ct. at 1517, that power has limits "when its exercise effects substantial modification of private contracts." *Id.* The severity of the impairment of a contractual relationship.

> measures the height of the hurdle the state legislation must clear. . . . [S]evere impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation

Allied Structural Steel, supra, 438 U.S. at 245, 98 S.Ct. at 2723.

Complete deference to a legislative assessment of reasonableness and necessity is, moreover, "not appropriate" where the State itself is a party to the contract, because "The state's interest is at stake". *United States Trust Co., supra,* 431 U.S. at 26, 97 S.Ct. at 1519.

> When a state itself enters into a contract, it cannot simply walk away from its financial obligation

Energy Reserves Group, supra, 103 S.Ct. at 705, n. 14 (1983).

In this case the central purpose of the covenant was to preserve Crane Neck as a single family residential area, and every property owner benefited by the covenant must be presumed to have purchased his home in reliance upon the covenant. The State statute, as interpreted and applied by the Court of Appeals, wholly abrogates the covenant by permitting multi-family, hostel or institutional use for eight unrelated and profoundly mentally retarded persons and their three 24-hour a day attendants. Thus, the contract impairment by the State is total and the right of every property owner in the area to see the area preserved for single family residential use is defeated.

Application of the State statute has, therefore, effected a total destruction of the expectations of all property owners who con-

tracted to purchase, and now own, properties burdened and benefited by the same restrictive covenant.

Moreover, the State did not adopt the statute challenged in this case until 1978, 33 years after the common plan of development of Crane Neck was first implemented by the recording of the first single family deed restrictions by the common grantor, Eversley Childs, and 23 years after the subject property itself was actually encumbered by this restriction. From this central fact, two important conclusions necessarily flow. First, since the State, prior to the enactment of §41.34(f), had never attempted to regulate covenants and restrictions applicable to real property, the contractual rights of the appellants were not acquired at a time when the contracting parties had reason to expect that such rights could subsequently be modified or extinguished by State law. Cf. *Veix* v. *Sixth Ward Building & Loan Ass'n,* 310 U.S. 32, 38, 60 S.Ct. 792, 794-795 (1940). Second, this is not a situation where appellants have attempted to contractually bypass a State statute, in an effort to frustrate public policy.

Furthermore, far from constituting an impermissible restriction upon alienation to members of a protected class such that judicial enforcement would violate the equal protection clause of the Fourteenth Amendment [*Shelley* v. *Kramer,* 334 U.S. 1, 68 S.Ct. 836 (1948); *Barrows* v. *Jackson,* 346 U.S. 249, 68 S.Ct. 1031 (1953)], the covenant at bar actually preserves quiet and secluded residential areas in the same manner as the zoning ordinance sustained in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 94 S.Ct. 1536 (1974). This Court has shown little disposition to strike down restrictive covenants which do not offend the Constitution. *Black* v. *Cutter Laboratories,* 351 U.S. 292, 76 S.Ct. 824 (1956); *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S.Ct. 614 (1955); see Note, *Churches & Zoning,* 70 Harv. L.Rev. 1428, 1437 (1957); Note, *Process—Oriented Approach to the Contract Clause,* 89 Yale L.J. 1623 (1980); *The Supreme Court, 1955 Term,* 70 Harv. L.Rev. 83, 123-25 (1956). It bears repetition that there is no necessity for

New York, in furtherance of its deinstitutionalization program, to acquire by lease or purchase properties encumbered by private covenants, as the number of areas limited to single family use by deed restrictions is small. Thus, it is neither necessary nor reasonable for the State to override private covenants as a means to carry out its public policy, since there are other more reasonable, less burdensome methods by which that policy could be fully implemented.

In short, the 5-prong test for measuring the constitutionality of a state statute that impairs some contractual rights, as set forth in *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398, 54 S.Ct. 231 (1934), and as elaborated by the Court in *United States Trust Co., Allied Structural Steel,* and *Energy Reserves Group,* is not satisfied in this case. There is no emergency. The State law was not enacted to protect a basic societal interest as contrasted with a favored group. The relief afforded by the statute is not appropriately tailored to the perceived problem. The legislation is not reasonable and is not limited in duration. Further, the subject matter of the contract impaired by the State legislation was not previously regulated.

Finally, under State law, a lessee of real property takes subject to, and is bound by, covenants and restrictions upon its use. *Booth* v. *Knipe,* 225 N.Y. 390 (1919). Thus, in this case, as in *United States Trust Co.,* the State seeks to "walk away" from its own obligations.

Summary of Fifth and Fourteenth Amendment claims: the state's actions constituted a taking of property without due process and without just compensation in violation of the Fifth and Fourteenth Amendments.

The complaint alleged that the challenged actions of the State "constitute or will constitute violations of the Fifth Amendment, Clause 4 . . . and of the Fourteenth Amendment, Section 1, Clause 3 of the Constitution of the United States." It was ap-

pellants' position that the appellees' actions extinguished or diminished valuable property rights of appellants without due process of law and without just compensation. This argument was not addressed by the state courts, which limited their rulings exclusively to the Contract Clause claim.

The State appellees, however, recognized that the taking issue was closely related to the Contract Clause claim. An Assistant Attorney General noted in an affidavit submitted to the trial court that enforcement of the restrictive covenant would result in either

> the retarded persons presently living in the residence being evicted and sent to an institution or that the State would be forced to take the property by eminent domain to extinguish the covenant and thus take the property off village tax rolls, a result the State defendants have, to this date, avoided.

In the Court of Appeals, the State appellees argued that:

> There is no protection against [use as a community residence] were the State to acquire the property by eminent domain.

The New York case cited for that proposition, *Matter of Ossining Urban Renewal Agency* v. *Lord,* 39 N.Y.2d 628, 630 (1976), holds that, upon acquiring any property by eminent domain, the State takes it free and clear of all restrictions and encumbrances; however, *Ossining* also holds that the State under such circumstances is obliged to justly compensate the owner of the extinguished encumbrance to avoid an unlawful taking in violation of state and federal constitutional provisions.

Thus, the State has clearly recognized and acknowledged that, had it acquired the Pool-Grofman residence by eminent domain, it would have been constitutionally obliged to award compensa-

tion to appellants and others benefited by the covenant encumbering the subject property.

The appellees appear to have taken the position that, by the device of leasing, rather than condemning the subject property, they have avoided the necessity of compensating adversely affected homeowners. We submit that such a position is untenable.

The State lease is apparently for a 5-year period with an option to renew for five years, and any future renewals, of course, would be beyond the control of the appellants. Indefinite use of the property for other than single family purposes has substantially the same adverse effect upon appellants as purchase or condemnation of the property. Given the mobile nature of suburban society, where private residences change hands frequently, the majority of the appellants and other affected homeowners may well seek to market their homes before the existing lease terminates. The presence of a community residence for mentally retarded persons in the area and the suspension of the restrictive covenant for the term of the lease would, as a practical matter, significantly depress the market value of all affected homes.

In sum, since the essence of the covenant is to preserve the area as a single family residential community, any attempt to distinguish between a lease that overrides the covenant and an outright purchase that does the same, should be rejected out of hand. Since the State concedes that it would have been constitutionally obliged to compensate appellants and other property owners had it acquired the subject premises by eminent domain, the result should be no different because the State elected to accomplish its objectives through the device of a lease.

CONCLUSION

For all of the above reasons, this Court should note probable jurisdiction of this appeal.

Dated, Melville, New York
June 29, 1984

Respectfully submitted,

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Memorandum decision of Special Term, Part I, Suffolk County, Gerard, J., dated April 24, 1981

SUPREME COURT SUFFOLK COUNTY
Special Term Part I

By Gerard J.S.C.

CRANE NECK ASSOCIATION INC.; et al.,

Plaintiffs,

against

NYC/LONG ISLAND COUNTY SERVICES GROUP; et al.,

Defendants.

Dated April 24th, 1981
Index #: 80-17312
Motion Date: December 10, 1980
Motion #: 22,297

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Memorandum decision of Special Term, Part I, Suffolk County, Gerard, J., dated April 24, 1981

Motion is granted to the following extent:

This motion seeks an order of this Court granting summary judgment to the plaintiffs pursuant to CPLR 3212 as a matter of law.

The defendants, Dr. Jonathan Pool and Dr. Bernard Grofman, are owners, as tenants-in-common of the premises known as 3 Johns Hollow Road, Old Field, Setauket, New York, title to which was acquired by deed from Thomas and Sallyann Barrett on April 6, 1972. The individual plaintiffs with one exception, are property owners within the Hamlet of Crane Neck, Village of Old Field, Town of Brookhaven. Their properties as well as the premises of defendants Grofman and Pool, were all originally contained in the land estate of an individual named, Eversley Childs. In the early 1900's Mr. Childs purchased some 500 acres of property surrounding Crane Neck Point within the Village of Old Field, and said properties were developed as Crane Neck Farm in the late 1930's. Beginning in 1945 and continuing for some ten years, in order to effectuate a common scheme of development and to maintain the character of the area, Eversley Childs, Eversley Childs, Jr. and the Estate of Eversley Childs, imposed identical deed restrictions upon all the parcels comprising the subject tract by reciting on said deeds, covenants that run with the land. Each of these deeds contained the following restrictive covenant:

"Subject to the following covenants and restrictions, which shall be construed as real covenants running with the land and shall be binding upon and enure to the benefit of the parties hereto, and their respective heirs, devisees, legal representatives, successors and assigns:

(a) There shall not be constructed nor maintained upon the

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said premises any building other than single family dwellings and outbuildings. That no house or dwelling costing less than $3,400 on the basis of 1944 material and labor costs shall be erected on the said premises and that no building of other than Cape Cod or Colonial design and architecture (and additional buildings shall conform in architecture to the main dwelling) shall be erected on said premises unless plans and specifications therefor have first been submitted to and approved in writing by the parties of the first part, or their duly authorized agent.

(b) That until such house or dwelling is erected no other building of any sort shall be erected on the premises.

(c) That no building, garage, or other outbuilding shall be erected upon said premises within sixty-five feet of the line of the road on which said premises front or within ten feet from the sidelines. The garage, however, may be attached to the main dwelling provided it conforms in architecture.

(d) That no part of said property nor any of the buildings to be erected thereon shall be used for any business purpose whatsoever and no goods or merchandise of any kind shall be manufactured, sold or kept for sale or exhibited thereon or therein and no business or trade shall be carried on or practiced on said premises or any part thereof and that no sign other than an "owner identity sign" of an area of not over 200 square inches shall be erected on the premises over 35 feet high.

(e) That no uncovered cesspools shall be built or used on said premises and no sewage, garbage or refuse of any sort shall be deposited in Flax Pond, Long Island Sound or Smithtown Bay. No pigs or goats shall be kept or maintained on said premises.

(f) It is understood that in the event the parties of the second part, their successors, or assigns, shall violate or fail to carry out any of the foregoing covenants and restrictions, proceed-

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ings to enforce compliance therewith by injunction or other means may be brought by the parties to the first part, their legal representatives, successors or assigns and failure to bring any such action or to take other proceedings shall not be held to be a waiver of any rights of the parties of the first part, their successors or assigns, to enforce compliance therewith.

Anything hereinbefore contained to the contrary notwithstanding, the parties of the first part, their legal representatives, successors or assigns, shall have at all times the right and power to extinguish, modify, cancel or release any one or more of the foregoing covenants, restrictions or reservations."

It is clear that the defendants Grofman and Pool were bound by the restrictions set forth in the aforementioned covenants since they are successors in a chain of title that was initiated by way of an executor's deed, dated May 11, 1955 recorded in Liber 3887 at Page 386 by the Suffolk County Clerk on May 17, 1955, which contained the restrictive covenants that ran with their plot of land (see *Gutherie* v. *Clark*), 57 Misc. 2d 709, 293 N.Y.S.2d 452). Further, "where there is a uniform scheme or planned development of a tract of land, all grantees of lots in that tract are bound by restrictive covenants and any grantee may bring an action against any other grantee to enforce such covenants." 13 N.Y. Jur. 344; *Korn* v. *Campbell,* 192 N.Y. 490, 495 85 N.E. 687, 689, 37 L.R.A.N.A.1.

Pursuant to an arrangement with the defendant NYC/Long Island County Services Group, a sponsoring agency of defendant New York State Department of Mental Retardation and Developmental Disabilities, a lease effective September 1, 1980 has been entered into between defendants Pool and Grofman and the State of New York providing for the establishment of a community residence at defendants Pool and Grofman's house

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for the habitation and instruction of eight severely retarded adults. The plaintiffs as owners of property in this Crane Neck Farm Development contend that the above lease violates the restrictive covenants that run with the land and seek a judgment of this Court enforcing said covenants against the defendants and prohibiting them from entering into or continuing a lease of the subject property for the purpose of utilizing it as a "community residence" for eight mentally retarded adults under the auspices of the Mental Hygiene Law.

One of the central issues in this action concerns the meaning and application of the restrictive covenant. The defendants contend that the covenant only applies to the construction and not the use of the structure as a one-family dwelling. "A covenant is simply a contract of a special nature and the primary rule for interpretation thereof is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement, but the entire context, and where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met." *Clark* v. *Devoe*, 124 N.Y. 120, 26 N.E. 275. The intent of the creators of the covenant (in this case Eversley Childs and Eversley Childs, Jr.) must be given effect and their intent should not be distorted under the guise of interpretation or construction. Mr. C. J. Heyser, Esq., who worked closely in the development of the Crane Neck parcels and the draughting of the restrictive covenants with Eversley Childs, states in his affidavit that "the subject covenant prohibiting a building on a Crane Neck lot of anything other than a single family dwelling or the maintaining of any dwelling other than a single family dwelling was intended not only to provide for a residential community in the architectural sense, but also to provide for a residential community in the overall, broad sense of one family living." (Affidavit, p. 2). To interpret this covenant to apply only to the construction of

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the dwellings would frustrate the intent of the creator and emasculate its restrictiveness. A covenant requiring that a building shall be constructed as a one-family dwelling applies to the use thereof as well as to the construction. (See, *Baumart* v. *Malkin*, 235 N.Y. 115, 139 N.E.210; *McCord* v. *Pickel*, 35 A.D.2d 897, 315 N.Y.S.2d 717 (3rd Dept.). Thus, it is clear from the terminology of the covenant that the deed restriction provides that only single family dwellings may be maintained inherently relates to both the construction and use of the residential buildings.

Having determined that the covenant applies to one-family use, the question arises as to whether the occupancy of defendants Grofman and Pool's house under the subject lease would comply with the restriction as to one family use. Section 41.34 (a)(1) of the Mental Hygiene Law defines a community residential facility for the disabled "as any facility operated or licensed by the Office of Mental Health or Office of Mental Retardation and Developmental Facilities which provides a supervised residence for from four to fourteen mentally disabled persons." Section 41.34(c) further provides that such facility shall be deemed a "family unit" for the purposes of *local laws and ordinances* (emphasis added). This Legislative edict in essence negates the enforceability of any local zoning laws or ordinances concerning the protection of single family districts. Therefore, any local law or zoning ordinance could not prohibit the defendants from leasing their premises as presently set forth. (See, *Little Neck Ass'n* v. *W.O.R.C.*, 52 A.D.2d 90, 383 N.Y.S.2d 364; *City of White Plains* v. *Ferraioli*, 34 N.Y.2d 300, 357 N.Y.S.2d 449; *Group House of Port Washington Inc.* v. *Board of Zoning and Appeals of the Town of North Hempstead*, 55 A.D.2d 636, 390 N.Y.S. 2d 427 (2nd Dept.) modified 45 N.Y. 2d 266, 408 N.Y.S.2d 377, 380 N.E.2d 207; *Incorporated Village of Old Field* v. *Introne*, 430 N.Y.S.2d 192). However, this Legislative definition of a "family" clearly does not apply to

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private restrictive covenants. "There is a fundamental distinction between zoning restrictions and private covenants. Zoning is an encroachment on private property rights and its enforcement requires the justification of an overriding public interest. In contrast, the restrictive private covenant is itself a property right and its subordination to the right of the purchaser is condemnation without authority of law; (*Christ's Methodist Church* v. *Macklanberg*, 198 Okl. 297, 300, 177 P.2d 1008." *Ginsberg* v. *Yeshiva of Far Rockaway*, 45 A.D.2d 706, 366 N.Y.S.2d 418. Thus, there exists a factual issue of whether this "state-created family" can be considered a family to meet the requirements of the restrictive covenant.

Mr. Kevin Bolier, a representative of the State of New York's Department of Mental Retardation and Development Disabilities, testified at a Hearing held in Melville, New York, concerning the feasibility of utilizing this property to house several mentally retarded adults and basically set forth the objects and goals of the community residence. Initially, he noted that these six to eight adults were profoundly and severely retarded and the principal of the project was to create for them a family-type living situation. He then elucidated in more detail the program to be installed to maintain family-type living environment. The agency would provide for the residents:

"1. a structured and adaptive interaction between residents and environment in a least restrictive living environment;

2. supervised training in the areas of activities of daily living to enable residents to live as independently as possible;

3. a long-term supervised least restrictive living environment;

4. a small family type living experience which offers its residents privacy and self-determination consistent with the resident's abilities, which give the residents the opportunity to learn the skills necessary for more independent living;

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5. a trained professional staff to assure that all resident's needs and goals are being met, as per each resident's individual service plan in this least restrictive environment;

6. the opportunity to interact in special community activities and access to community agencies, as do other members of the communities, and

7. a recreational program at the community residence and also utilize community recreational facilities.

The population of the house will be six residents age 18 years and above with the possibility of two additional respite beds. These Suffolk County residents' functioning range will be profoundly retarded but they will be ambulatory. The length of stay of the residents will be indefinite, based on the individual's needs.

The training will encompass the following:

(a) a structured toilet training program to develop and maintain independent toilet skills;

(b) a structured feeding program to develop and maintain independent feeding skills;

(c) a structured grooming program, which will encompass training in washing hands, washing face, brushing teeth, washing hair, general bathing;

(d) a structured training in dressing, which will include buttoning, tying shoes, starting zippers and hanging-up clothes;

(e) training in housekeeping, which includes: setting a table, making a bed, sweeping, changing a bed and drying dishes, and

(f) generalized training in caring for property, both personal and public.

These basic concepts will be taught to all residents in a struc-

tured setting at least six hours a day, five days and more realistically to promote consistency, seven days a week at the community residence. There will be two surrogate parents at the residence 24 hours a day, with a professional staff in a ratio of 2 to 1 to provide the necessary activities in daily living training during the day for a period of approximately 6 hours. Eventually, when the residents have mastered these skills, they will go out into the community and work in a workshop setting. This process has been calculated to take from six to eight months."

The establishment of these group homes in residential neighborhoods was specifically designed as a more enlightened alternative to the destructive warehouses such as the Willowbrook State School in Staten Island. However, neither the need for this kind of facility nor the motives of the plaintiffs or defendants can overcome any violation of the restrictive covenant. This group is clearly not a family under any circumstances except by statutory mandate of the Mental Hygiene Law, which as has previously been pointed out does not apply to a private restrictive covenant. This home as presently occupied is a public health-related facility, a creature of statute, sustained by public funds and monitored by government agencies. The sole purpose, however laudable, is the care of a group of unrelated individuals who are incapable of living independently or with a natural family and need continued uninterrupted supervision. To consider this group a family unit would undermine the thoughts, words and concepts of the formulators of the restrictive covenant. Thus, the Court must consider the occupancy of defendants Grofman and Pool's home as presently constituted under the lease of September 1, 1980 in violation of the restrictive covenant that encumbers the utilization of their property.

However, there still exist questions of fact that can only be resolved after further discovery and a trial concerning whether

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the plaintiffs have waived their rights under the covenant by violating the covenant themselves or whether they should be estopped from enforcing the restrictive covenant due to laches or previous acquiescence in violations thereof. There is also a defense raised that the character of the neighborhood has so changed as to defeat the object and purposes for which the restrictions were imposed. Equity may refuse to enforce a restrictive covenant where the change is such that the restriction has become valueless to the property of the plaintiffs and onerous to the property of the defendants. (See, *Todd* v. *North Avenue Holding Corp.*, 121 Misc. 301, 305, 201 N.Y.S.2d 31, 35 aff'd 208 App. Div. 854, 204 N.Y.S. 953 (2nd Dept.))

However, the change must be substantial so as to support a finding that the usefulness of the covenant has been destroyed. These issues can not be resolved on these papers and must await a final determination at trial.

Submit judgment on notice.

LESTER E. GERARD
J.S.C

Decision of the Appellate Division of the Supreme Court, Second Judicial Department, dated March 7, 1983, as printed in 460 NYS2d 69

92 A.D.2d 119

CRANE NECK ASSOCIATION, INC., et al.,

Respondents,

against

NYC/LONG ISLAND COUNTY SERVICES GROUP, et al.,

Appellants, et al., *Defendants.*

Supreme Court, Appellate Division,
Second Department.

March 7, 1983.

Appeal was taken from so much of order of the Supreme Court, Special Term, Suffolk County, Lester E. Gerard, J., as granted homeowners' association and certain individual homeowners' partial summary judgment declaring that establishment of community residence was in violation of restrictive covenant. The Supreme Court, Appellate Division, Brown, J., held that establishment of community residence for eight mentally disabled adults did not violate provisions of restrictive covenant limiting use of premises to "single family dwellings."

Reversed.

Robert Abrams, Atty. Gen., New York City (Thomas P. Dorsey, Robert S. Hammer and Robert L. Schonfeld, Asst. Attys. Gen., of counsel), for appellants.

Weber, Haberman, Gross & Glueck, Melville (Steven J. Glueck, Melville, of counsel), for appellants Pool and Grofman (relying on the brief submitted by the State appellants).

Decision of the Appellate Division of the Supreme Court, Second Judicial Department, dated March 7, 1983, as printed in NYS2d

Pelletreau & Pelletreau, Patchogue (Kevin A. Seaman and Benjamin L. Herzweig, Patchogue, on the brief), for respondents.

Before THOMPSON, J.P., and BROWN, RUBIN and BOYERS, JJ.

BROWN, Justice.

This litigation evolves out of the establishment of a community residence for eight mentally disabled adults by defendant New York City/Long Island County Services Group (NYC/LICSG), an agency of defendant New York State Department of Mental Retardation and Developmental Disabilities, at 3 Johns Hollow Road in the Hamlet of Crane Neck, Incorporated Village of Oldfield.

In August of 1979, NYC/LICSG, acting pursuant to section 41.34 (subd. [c], par [1], formerly subd. [b], par. [1] of the Mental Hygiene Law (concerning site selection of community residential facilities), notified the Village of Oldfield of its interest in establishing a community residence at the Johns Hollow Road location. The notification was accompanied by a detailed fact sheet as to the nature of the proposed residence. On September 18, 1979 the village conducted a public hearing in response to the notification, following which it registered a formal objection to the establishment of the residence.

On October 26, 1979 the Commissioner of Mental Retardation and Developmental Disabilities conducted a hearing pursuant to section 41.34 (subd. [c], par. [5], formerly subd. [b], par. [5]) of the Mental Hygiene Law. At the conclusion of the hearing the commissioner rejected the village's objections, determining, *inter alia,* that the proposed site would not sub-

stantially alter the surrounding area and would be appropriate for such a residence. That determination was subsequently confirmed by this court and the village's article 78 proceeding was dismissed (*Incorporated Vil. of Oldfield* v. *Introne*, 81 A.D.2d 906, 441 N.Y.S.2d 418). Following the commissioner's determination, NYC/LICSG entered into a lease of the premises with the owners, defendants Jonathan Pool and Bernard Grofman.

During the pendency of the special proceeding, plaintiffs, a homeowners association and certain individual homeowners who are, with one exception, residents of the Hamlet of Crane Neck, commenced the instant action seeking declaratory and injunctive relief to bar the governmental defendants from operating the community residence and to prohibit Pool and Grofman from leasing it for such purpose. Essentially, plaintiffs argued that such use would violate the terms of a restrictive covenant affecting the premises which barred construction or maintenance of "*any building other than single family dwellings*" (emphasis added).

The properties of the individual plaintiffs, as well as that of Pool and Grofman, were originally part of the estate of one Eversly Childs, who had acquired some 500 acres of land surrounding Crane Neck Point during the early part of the century. During the 1930's the land was developed as Crane Neck Farm and for a period from 1945 onward, in order to maintain the character of the area and effectuate a common scheme of development, Mr. Childs and his estate imposed identical deed restrictions upon all parcels comprising Crane Neck Farm. These deed restrictions, which include the covenant at issue here, provide more fully:

> "Subject to the following covenants and restrictions, which shall be construed as real covenants running with the land

and shall be binding upon and enure to the benefit of the parties hereto, and their respective heirs, devisees, legal representatives, successors and assigns:

"(a) There shall not be constructed nor maintained upon the said premises any building other than single family dwellings and outbuildings.

* * *

"(d) That no part of said property nor any of the buildings to be erected thereon shall be used for any business purpose whatsoever and no goods or merchandise of any kind shall be manufactured, sold or kept for sale or exhibited thereon or therein and no business or trade shall be carried on or practiced on said premises or any part thereof and that no sign other than an 'owner identity sign' of an area of not over 200 square inches shall be erected nor shall any towers or other buildings be erected on the premises over 35 feet high.

* * *

"(f) It is understood that in the event the parties of the second part, their successors, or assigns, shall violate or fail to carry out any of the foregoing covenants and restrictions, proceedings to enforce compliance therewith by injunction or other means may be brought by the parties of the first part, their legal representatives, successors or assigns and failure to bring any such action or to take other proceedings shall not be held to be a waiver of any rights of the parties of the first part, their successors or assigns, to enforce compliance therewith.

"Anything hereinbefore contained to be contrary notwithstanding, the parties of the first part, their legal representa-

tives, successors or assigns, shall have at all times the right and power to extinguish, modify, cancel or release any one or more of the foregoing covenants, restrictions or reservations."

Following joinder of issue, plaintiffs moved for summary judgment arguing, *inter alia,* that the covenant restricts not only the construction of buildings but their use as well; that even under a broad definition of the concept of "family", the proposed use is more akin to that of an institution than to the functional equivalent of a family; and that, notwithstanding the provisions of section 41.34 of the Mental Hygiene Law limiting the ability of localities to restrict the establishment of community residences for the mentally retarded through local ordinances, restrictive covenants constitute private property rights which must be observed by the State.

In opposing the motion, defendants asserted that the proposed use was not prohibited by the covenant and that, at best, the terms of the covenant are ambiguous as to whether the proposed use is a prohibited one and as to whether the term "family" as used therein was intended to exclude a community residence which is the functional equivalent of a family and, therefore, must be construed against those seeking its enforcement. They also argued that since the relief requested is equitable in nature, it should not be granted since it did not appear that the injury to plaintiffs would be serious or substantial if relief were denied, while if the relief were granted, it would result in great hardship to those sought to be restrained.

Special Term granted partial summary judgment to plaintiffs to the extent of declaring that the restrictive covenant must be construed to apply to both construction and use of residential

Decision of the Appellate Division of the Supreme Court, Second Judicial Department, dated March 7, 1983, as printed in NYS2d

buildings[1] and that the occupancy of the premises under the lease from Grofman and Pool to the governmental defendants was violative of the restrictive covenant. It further concluded, however, that questions of fact existed as to whether plaintiffs waived their rights under the covenant by virtue of their own violations of the same; whether they were estopped from enforcing the covenant due to laches or previous acquiescence in violations and whether the character of the neighborhood had changed to the extent that the covenant's object and purpose were no longer enforceable.

Special Term stated that section 41.34 (subd. [f], formerly subd. [e]) of the Mental Hygiene Law, which provides that facilities such as the one in question shall be deemed "a family unit" for the purposes of local laws and ordinances, is inapplicable to private restrictive covenants. It concluded that "[t]his home as presently occupied is a public health-related facility, a creature of statute, sustained by public funds and monitored by government agencies. The sole purpose, however laudable, is the care of a group of unrelated individuals who are incapable of living independently or with a natural family and need continued uninterrupted supervision. To consider this group a family unit would undermine the thoughts, words and concepts of the formulators of the restrictive covenant."

We reverse. The establishment here of a community residence for eight mentally disabled adults under the provisions of sections 41.33 and 41.34 of the Mental Hygiene Law does not vio-

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[1]We are in agreement with Special Term that the restrictive covenant here applies not only to the construction and maintenance of single-family dwellings, but to their use as well (see *Baumart* v. *Malkin*, 235 N.Y. 115, 139 N.E. 210; *McCord* v. *Pichel*, 35 A.D.2d 879, 315 N.Y.S. 2d 717).

late the provisions of the instant restrictive covenant limiting use of the premises to "single family dwellings". Moreover, it is our view that as a matter of public policy, such a private restrictive covenant as the one at bar may not be enforced so as to prevent the establishment of community residences under the Mental Hygiene Law.

Plaintiffs, in arguing for a narrow construction of the term "single family dwelling", assert that the group of persons residing in the community residence is significantly distinct from the traditional concept of "family" (i.e., a group of persons united by blood, marriage, historical and legal bonds) as was envisioned at the time the covenant was created.

While this traditional concept of family is the one which is most immediately recognizable, there is a significant body of law which holds that the term "family" may be construed to extend beyond this traditional, biological concept to encompass other groupings of individuals. In *City of White Plains* v. *Ferraioli*, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756, the court was called upon to decide whether a group home consisting of a married couple, their two children, and 10 foster children qualified as a single family dwelling for one housekeeping unit in accordance with a local zoning ordinance. In upholding the establishment of the group home, the court recognized the proper purpose to be served by an ordinance limiting the uses in a zone to single family units, but stated that (p. 306, 357 N.Y.S.2d 449, 313 N.E.2d 756) "neither by express provision nor construction may [such an ordinance] limit the definition of family to exclude a household which in every [sense] but a biological sense is a single family." Therefore, the court reasoned that for the purposes of determining whether a particular group residence complied with a single family zoning requirement, it was neces-

sary to look to the character of the grouping to see whether in theory, size, appearance and structure the group residence emulated the traditional family unit.

"So long as the group home bears the generic character of a family unit as a relatively permanent household and is not a framework for transients or transient living, it conforms to the purpose of the ordinance * * * Moreover, in no sense is the group home an institutional arrangement, which would be another matter. Indeed, the purpose of the group home is to be quite the contrary of an institution and to be a home like other homes" (*City of White Plains* v. *Ferraioli, supra,* pp. 305-306, 357 N.Y.S.2d 449, 313 N.E.2d 756).

The *Ferraioli* court's analysis of the problem of the establishment of group residences in areas zoned for single family dwellings has been applied in a number of cases involving an assortment of groupings (see *Group House of Port Washington* v. *Board of Zoning & Appeals of Town of North Hempstead,* 45 N.Y.2d 266, 408 N.Y.S.2d 377, 380 N.E.2d 207 [group home consisting of two permanent surrogate parents and seven children, with temporary replacements available for the surrogate parents]; *Little Neck Community Assn.* v. *Working Organization for Retarded Children,* 52 A.D.2d 90, 383 N.Y.S.2d 364, mot. for lv. to app. den. 40 N.Y.2d 803, 387 N.Y.S.2d 1030, 356 N.E.2d 482 [group home for seven to twelve retarded children organized to emulate a biological family unit]; *Incorporated Vil. of Freeport* v. *Association for Help of Retarded Children,* 94 Misc.2d 1048, 406 N.Y.S.2d 221, affd. 60 A.D.2d 644, 400 N.Y.S.2d 724 [community residence for eight retarded adults with house parents]).

There are also a number of decisions from sister states in which the courts have construed the term "family" in a restric-

tive covenant to encompass a group residence for mentally disabled individuals (*Crowley* v. *Knapp*, 94 Wis.2d 421, 288 N.W. 2d 815; *Costley* v. *Caromin House, Inc.*, 313 N.W.2d 21 [Minn.]; *Hobby & Son* v. *Family Homes of Wake County*, 302 N.C. 64, 274 S.E.2d 174, 175 [N.C.]; *Leland Acres Homeowners Assn.* v. *R.T. Partnership*, 106 Mich. App. 790, 308 N.W.2d 648; *Malcolm* v. *Shamie*, 95 Mich. App. 132, 290 N.W.2d 101 [Mich.]; *Bellarmine Hills Assn.* v. *Residential Systems Co.*, 84 Mich. App. 554, 269 N.W.2d 673). It should be noted that the courts in these cases took cognizance of the strong public policy considerations in favor of establishing such group residences in reaching the conclusion that the groupings in question were families within the terms of the restrictive covenants (see, generally, What Constitutes a "Family" Within Meaning of Zoning Regulation or Restrictive Covenant, Ann. 71 A.L.R.3d 693).

In New York, case law, insofar as it concerns the establishment of community residences for the mentally disabled in areas zoned for single family dwellings, is now reflected in the provisions of the Padavan Law (Mental Hygiene Law, § 41.34 [L. 1978, ch. 468, § 2]), which established guidelines and procedures to be followed in the process of selecting sites for such community residences. It is specifically provided therein that a "community residence established pursuant to [the statute] * * * shall be deemed a family unit for purposes of local laws and ordinances" (Mental Hygiene Law, § 41.34, subd. [f]).[2]

Plaintiffs argued, however, and Special Term agreed, that these statutory and case law expansions of the term "family" in rela-

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[2]A number of other states have enacted similar legislation to facilitate the acceptance and establishment of group residences in residential communities (see 2 Rathkopf, The Law of Zoning and Planning [4th ed] § 17A.05[2][c]).

tion to zoning ordinances and local laws should not apply to the use of that term in the instant private restrictive covenant.

In support of their argument, plaintiffs rely primarily on the case of *Tytell* v. *Kaen* (Supreme Ct, Bronx County, June 4, 1979, DiFEDE, J., affd. 77 A.D.2d 519, 429 N.Y.S.2d 1018, on the opn of DiFEDE, J.). In *Tytell,* the court was presented with a set of circumstances very similar to those at bar. The plaintiffs sought to bar the establishment of a group residence for eight mentally retarded children in particular premises on the grounds that such use would violate both the local zoning ordinance and certain private restrictive covenants applicable to the premises. Special Term granted summary judgment to the plaintiffs, concluding that the proposed use would violate the restrictive covenants, which, *inter alia,* limited use of the premises to "one private dwelling house for the use of a single family", and specifically barred use as a "public or private home retreat, asylum, refuge, convent or school where any person may be treated, sheltered, cared for, instructed or taught" (slip opn, p. 14). The court refused to apply the expanded concept of family as set forth in *City of White Plains* v. *Ferraioli,* 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756, *supra,* and its progeny to the use of that term in a private restrictive covenant. We decline to so limit our interpretation.

At the outset, in reviewing the scope of restrictive covenants, it must be recognized that covenants restricting the use of land are contrary to the general policy in favor of the free and unobstructed use of real property (*Premium Point Park Assn.* v. *Polar Bar,* 306 N.Y. 507, 119 N.E.2d 360), and, to that end, are to be strictly construed against those seeking enforcement (*Huggins* v. *Castle Estates,* 36 N.Y.2d 427, 430, 369 N.Y.S.2d 80, 330 N.E.2d 48; *Buffalo Academy of Sacred Heart* v. *Boehm*

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Bros. Inc., 267 N.Y. 242, 196 N.E. 42). If, upon examination, a covenant is found to be susceptible to two constructions, then the less restrictive construction will be adopted, with all doubts and ambiguities being resolved in favor of such less restrictive construction (*Aronson* v. *Riley*, 87 A.D.2d 879, 449 N.Y.S.2d 544; *Lewis* v. *Spies*, 43 A.D.2d 714, 350 N.Y.S.2d 14).

A fundamental purpose of group residences such as the one at bar is to move the care of mentally disabled persons away from institutional settings and toward less restrictive environments whenever that possibility exists. The residence here, which is structured for a small group of six to eight residents, is intended to create "a small family type living experience" for those residents. To enable these residents to live as independently as possible within such a less restrictive environment, the program calls for, among other things, training in various activities of daily living, development of interpersonal relationships both within the residence and with the surrounding community, and recreational activities. The goal is to establish a relatively permanent, stable environment, operating as a single household unit under a set of house-parents, which as much as possible bears the generic characteristics of the traditional family (*City of White Plains* v. *Ferraioli*, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756, *supra; Little Neck Community Assn.* v. *Working Organization for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364, mot. for lv. to app. den. 40 N.Y.2d 803, 387 N.Y.S.2d 1030, 356 N.E.2d 482, *supra*).

As with the group residences under review in the *Ferraioli*, *Little Neck* and *Freeport cases*, it is the emulation of the traditional family unit which, in our opinion, satisfies the terms of the restrictive covenant, notwithstanding the lack of a biological or legal relationship among residents. The primary purpose

of that covenant, preservation of the quality of life and character of the neighborhood, will not be contravened by the presence of this group residence (see *Little Neck Community Assn.* v. *Working Organization for Retarded Children*, 52 A.D.2d 90, 94, 383 N.Y.S.2d 364, *supra*). It will represent another "family" in the community. As the court in *Ferraioli* stated (34 N.Y. 2d at p. 306, 357 N.Y.S.2d 449, 313 N.E.2d 756): "[T]he purpose of [this] group home is to be quite the contrary of an institution and to be a home like other homes."

Moreover, even were we to conclude that the definition of the term "family" as manifested in *Ferraioli* and its progeny (and in the provisions of the Mental Hygiene Law) should be applied only with respect to the application of local laws and ordinances and not to the use of the term "family" in a restrictive covenant, it is our opinion that as a matter of public policy the restrictive covenant in question may not be enforced so as to bar the establishment of this residence.

Actions seeking to enforce restrictive covenants are equitable in nature and enforcement will not be had where it would contravene public policy (*Silverstein* v. *Shell Oil Co.*, 40 A.D.2d 34, 337 N.Y.S.2d 442, affd. 33 N.Y.2d 950, 353 N.Y.S.2d 730, 309 N.E.2d 131).

The dramatic disclosures involving the care and treatment of the mentally retarded [ill] at Willowbrook and similar institutions have enlightened us to the injustice inherent in institutionalizing vast numbers of mentally disabled individuals who, while not quite capable of independent living, are able to more fully realize their individual potential if placed in a less restrictive environment. Thus, in recent years, on both the State and Federal level, great emphasis has been focused upon efforts to maximize treat-

ment services and habilitation programs for persons with developmental disabilities, while at the same time steps have been taken to assure that such services are provided in a fashion that is least restrictive to personal liberty. In particular, these efforts have been characterized by the deinstitutionalization of the mentally retarded and their placement in less restrictive environments in the community at large.

In the Federal area this effort is embodied in the provisions of the Developmentally Disabled Assistance and Bill of Rights Act (U.S. Code, tit. 42, § 6000, *et seq.*). Here in New York, Governor Carey committed the State to a major program of deinstitutionalization in the 1975 consent decree in *New York State Assn. for Retarded Children* v. *Carey*, 393 F.Supp. 715, 717. Implementation of this policy of establishing community residences for the mentally disabled has been greatly aided by the passage of the Padavan Law (Mental Hygiene Law, § 41.34), which sets forth guidelines for site selection for such facilities. At the time of its enactment, the Legislature determined "that mentally disabled individuals have the right to attain the benefits of normal residential surroundings". It further declared "that the opportunities for mentally disabled individuals will be enhanced, and the delivery of services improved, by providing these individuals with the least restrictive environment that is consistent with their needs, and that such environment will foster the development of maximum capabilities. It is the intention of this legislation to meet the needs of the mentally disabled in New York state by providing, wherever possible, that such persons remain in normal community settings, receiving such treatment, care, rehabilitation and education as may be appropriate to each individual. It is further intended that communication and cooperation between the various state agencies, local agencies and local communities be fostered by this legislation, and that this

will be best achieved by establishment of clearly defined procedures for the selection of locations for community residences, to best protect the interests of the mentally disabled and ensure acceptance of community residences by local communities. In the establishment of such community residences, the legislature recognizes the need to avoid, wherever practicable, a disproportionate distribution of community residences and other similar facilities" (L. 1978, ch. 468, § 1).

These expressions of purpose were echoed by Governor Carey, who stated in approving this landmark legislation, that "the bill aims to facilitate the establishment of community residences by discouraging frivolous legal challenges that have needlessly delayed proper establishment of such facilities in the past, at great cost to the litigants" (McKinney's 1978 Session Laws of New York, p. 1821).

We view this expressed policy as being broad enough to overcome not only challenges to group residences which are based upon local zoning ordinances, but also those based upon private restrictive covenants (see *Silverstein* v. *Shell Oil Co.*, 40 A.D.2d 34, 337 N.Y.S.2d 442, affd. 33 N.Y.2d 950, 353 N.Y.S.2d 730, 309 N.E.2d 131 *supra*). The provisions of the Padavan Law, which establish guidelines for community participation in the site selection process, provide a sufficient check on the possibility of any one community or neighborhood becoming saturated with such residences or of a residence being placed in an entirely inappropriate locale (Mental Hygiene Law, § 41.34). Beyond that, however, communities and residents should not be permitted to decide unilaterally by means of restrictive covenants, possibly employing language more specific than that at bar, that they will not permit the establishment of group residences in their area.

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Accordingly, we reverse Special Term's grant of partial summary judgment in favor of plaintiffs, declare that the use in question is not violative of the terms of the restrictive covenant and as a matter of public policy, such a private restrictive covenant as the one at bar may not be enforced so as to prevent the establishment of community residences under the Mental Hygiene Law, and dismiss the complaint insofar as it seeks injunctive relief.

Order of the Supreme Court, Suffolk County, dated May 28, 1981 reversed insofar as appealed from, on the law, with $50 costs and disbursements, summary judgment is granted to the defendants, it is declared that the establishment of the community residence in question is not violative of the restrictive covenant that encumbers the utilization of the individual defendants' residence and as a matter of public policy, such a private restrictive covenant as the one at bar may not be enforced so as to prevent the establishment of community residences under the Mental Hygiene Law, and the complaint is otherwise dismissed insofar as it seeks injunctive relief.

THOMPSON, J.P., and RUBIN and BOYERS, JJ., concur in the opinion of BROWN, J.

Opinion of the New York Court of Appeals dated February 23, 1984

61 N.Y.2d 154

CRANE NECK ASSOCIATION, INC., *et al.*,

Appellants,

against

NEW YORK CITY/LONG ISLAND COUNTY SERVICES GROUP, *et al.*,

Respondents, et al., Defendants.

Court of Appeals of New York
Feb. 23, 1984

Homeowners' association brought action alleging that agencies use of leased house for housing and caring for eight severely retarded adults violated restrictive covenant prohibiting construction or maintenance of other than single-family dwellings. The Supreme Court, Special Term, Suffolk County, Lester E. Gerard, J., granted partial summary judgment to plaintiffs, and the Supreme Court, Appellate Division, Second Judicial Department, 92 A.D.2d 119, 460 N.Y.S.2d 69, reversed. The Court of Appeals, Kaye, J., held that although the residence could not be a single-family dwelling as contemplated by the deed restriction, the covenant could not be equitably enforced because to do so would have contravened long-standing public policy favoring establishment of such residences for the mentally disabled.

Affirmed.

Kevin A. Seaman, Patchogue, for appellants.

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Robert Abrams, Atty. Gen. (Thomas P. Dorsey, Peter H. Schiff and Robert L. Schonfeld, Asst. Attys. Gen., of counsel), for New York City/Long Island County Services Group and another, respondent.

OPINION OF THE COURT

KAYE, Judge.

Beginning in 1945, as the Long Island estate of Eversley Childs was divided into residential parcels, each deed within the tract (called Crane Neck Farm) included an identical covenant restricting buildings to "single family dwellings." Respondent agencies, implementing a long-standing State policy to deinstitutionalize retarded persons and place them in community settings, in 1980 leased property within Crane Neck to house and care for eight severely retarded adults. Appellants, Crane Neck property owners, contending that this use violates the restrictive covenant, seek a judgment enforcing the covenant and enjoining continuation of the lease.

Special Term granted appellants partial summary judgment, concluding that the State facility was not a single-family dwelling and therefore violated the covenant, yet finding that there were fact issues as to whether the restrictions of the covenant had been waived by past violations and whether the character of the neighborhood had so changed as to render the covenant unenforceable in equity. The Appellate Division, 92 A.D.2d 119, 460 N.Y.S.2d 69, reversed and dismissed the complaint, determining that the facility could be considered a single-family dwelling consistent within the restrictive covenant, and that in any event the covenant could not be enforced to prevent the residence as a matter of public policy. On the latter ground, we affirm the order of the Appellate Division.

Opinion of the New York Court of Appeals dated February 23, 1984

I

Pursuant to a lease effective September 1, 1980 between the owners of the subject property (respondents Jonathan Pool and Bernard Grofman) and respondent New York City/Long Island County Services Group (an agency of respondent New York State Department of Mental Retardation and Developmental Disabilities), eight profoundly retarded adults formerly in institutions came to reside in a six-bedroom home situated on two wooded acres at 3 Johns Hollow Road in the Hamlet of Crane Neck, Village of Old Field. These adults were in need of uninterrupted supervision.

According to the State's program, a non-resident professional staff of approximately 16 persons cares for the residents, trains them, and provides therapy where needed. While resident "houseparents" are in theory part of the program, it is not clear from the record that there have in fact been houseparents at 3 Johns Hollow Road. At least three supervisory persons are to be within the home around the clock.

In a family-type environment and under constant supervision, the disabled persons residing in Crane Neck are taught socialization as well as basic physical skills. Structured "day programming" lasting six or more hours a day is conducted in feeding, toilet training, personal grooming and health habits, dressing, housekeeping, and caring for property. After the initial period of intensive training, once sufficient independence is developed, the residents are enrolled in sheltered workshops in the area, such as the United Cerebral Palsy Center in Commack, the Industrial Home for the Blind in Melville, and the Suffolk Child Development Center in Smithtown, returning to 3 Johns Hollow Road each day. As they are able, also, they begin interacting with merchants and others in the neighborhood. The stays at 3 Johns Hollow are of indefinite duration, but it appears that

residents upon reaching a certain degree of development are expected to leave and be replaced by others in need of care and training.

II

The question presented on this appeal is whether use of the leased premises at 3 Johns Hollow Road should be enjoined by equitable enforcement of the restrictive covenant in the lessors' deed. Any analysis of this issue of course must begin with language of the covenant.

Starting in 1945, and continuing for about 10 years, uniform deed restrictions were imposed on all parcels comprising the tract of Crane Neck. Each of these deeds, including the deed from which respondent lessors derived title, included the following:

"Subject to the following covenants and restrictions, which shall be construed as real covenants running with the land and shall be binding upon and enure to the benefit of the parties hereto, and their respective heirs, devisees, legal representatives, successors and assigns:

"(a) There shall not be constructed nor maintained upon the said premises any buildings other than single family dwellings and outbuildings. That no house or dwelling costing less than $3,500 on the basis of 1944 material and labor costs shall be erected on the said premises, and that no building other than Cape Cod or Colonial design and architecture (and additional buildings shall conform in architecture to the main dwelling) shall be erected on said premises unless plans and specifications therefor have first been submitted to and approved in writing by the parties of the first part, or their duly authorized agent."

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From a reading of the covenant and the undisputed evidence regarding the intent of the grantor, we conclude that the deed restriction was imposed to preserve Crane Neck as a neighborhood of single-family dwellings, not only architecturally but also functionally. We are therefore in agreement with both courts below that, to give the effect intended by its creator, the covenant must be read to apply not only to the physical construction of single-family dwellings within Crane Neck but also to their actual use. (*Baumert* v. *Malkin,* 235 N.Y. 115, 139 N.E. 210.)

We cannot agree, however, with the conclusion of the Appellate Division that the community residence at 3 Johns Hollow Road functions as a single-family dwelling. It fits neither a traditional concept of a single-family unit known in 1945 (see What Constitutes a "Family" Within Meaning of Zoning Regulation or Restrictive Covenant, Ann., 172 A.L.R. 1172), by which its use must be measured (*Clark* v. *Devoe,* 124 N.Y. 120, 123, 26 N.E. 275), nor even the expanded definitions of "family" of more recent origin (see *City of White Plains* v. *Ferraioli,* 34 N.Y.2d 300, 306, 357 N.Y.S.2d 449, 313 N.E.2d 756).

In support of their argument that the use is consonant with the covenant, respondent agencies point to the fact that the residence in theory functions as one housekeeping unit providing a homelike atmosphere for individuals who cannot remain in their natural families, meanwhile teaching them basic skills which will enable them to live independently. But these indicia of family life do not create a family.

We found in *City of White Plains* v. *Ferraioli,* 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756, *supra* that a group home consisting of a married couple, their two children and 10 foster children qualified as a family for purposes of a zoning ordinance, and in *Group House of Port Washington* v. *Board of Zoning &*

Appeals, 45 N.Y.2d 266, 271, 408 N.Y.S.2d 377, 380 N.E.2d 207, we concluded that a group home of seven children with two surrogate parents could not be distinguished from a natural family for that same purpose. Those decisions, which have in effect been codified in subdivision (f) of section 41.34 of the Mental Hygiene Law, are not controlling here. This case concerns the application of a private covenant, not a zoning ordinance. Furthermore, a much different factual situation is presented.

In this context, a home inhabited by eight unrelated adults each receiving uninterrupted professional supervision and care is not a single-family unit. The residents are twice outnumbered by a changing, nonresident staff of nurses, physical and recreational therapists, dieticians and others finding no equivalent in a biologically unitary family, or indeed in any expanded concept of the word "family." While neither the size of the resident group nor the nature of its daily activities would necessarily determine the issue (see *Incorporated Vil. of Freeport* v. *Association for Help of Retarded Children*, 94 Misc.2d 1048, 1049, 406 N.Y.S. 2d 221, affd. 60 A.D.2d 644, 400 N.Y.S.2d 724), the absence of regular houseparents and, most significantly, the presence of a large complement of non-resident professional attendants distinguish the residence at 3 Johns Hollow Road from a single-family unit.

The residence being operated by respondent agencies within Crane Neck, then, cannot be considered a single-family dwelling as contemplated by the deed restriction.

III

But even if use of the property violates the restrictive covenant, that covenant cannot be equitably enforced because to do so

would contravene a long-standing public policy favoring the establishment of such residences for the mentally disabled.[1]

Over the past three decades this State has developed a policy favoring the deinstitutionalization of mentally and developmentally disabled persons, and their placement in supervised residences housing small groups, called "community residences" (Mental Hygiene Law, § 1.03, subd. 28).[2] The Mental Hygiene Law authorizes the Commissioner of Mental Retardation and Developmental Disabilities to operate these residences (Mental Hygiene Law, § 41.33), and provides for grants and reimbursements to others who offer such services (Mental Hygiene Law, §§ 41.36, 41.37, 41.38).

The first steps toward community orientation in the provision of services to the mentally disabled came in 1954 when the Legislature established community mental health boards in order to develop and improve community treatment services, a program described by Governor Dewey, in approving the legislation, as one that "offers a unique opportunity to reclaim the productive value of men and women who might otherwise spend their days within the walls of a mental institution." (L.1954, ch. 10; McKinney's Session Laws of N.Y., 1954, p. 1372). In 1967, the Mental Hygiene Law and Private Housing Finance Law were amended to direct the commissioner to acquire or construct "community residential facilities to be operated as hostels for the mentally retarded" and to grant financial assistance to public or private nonprofit organizations for acquisition and construc-

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[1]In view of our holding, there is no need to reach the issue of waiver of the restrictive covenant, or what value if any it might have.

[2]An additional public policy regarding housing for mentally disabled individuals is expressed in subdivision 5 of section 296 of the Executive Law.

tion of such facilities. (L.1967, ch. 576.) Governor Rockefeller observed at the time that these community residences allow "the mildly retarded person [to] lead a reasonably full life in dignity, self-support and self respect" and not "to be committed to almost complete dependency in a State institution." (McKinney's Session Laws of N.Y., 1967, p. 1531.)

While the community residence program was at first directed to placement of mildly retarded persons, in 1975 Governor Carey pledged this State to a major program of deinstitutionalization of more severely disabled persons, such as those involved in this action, in the consent decree issued in *New York State Assn. for Retarded Children* v. *Carey*, 393 F.Supp. 715. In 1978, the Department of Mental Hygiene issued a five-year plan for community placement and support of the chronically mentally ill, stating that "[t]he needs of the chronically mentally ill are now better understood and appropriate community support alternatives to institution have been identified; every effort should be made to provide what has been found to be needed." (New York State Dept of Mental Hygiene, Division of Mental Health, "Appropriate Community Placement and Support: Phase One, Five Year Mental Health Plan," p. ii [Jan., 1978].)

The State policy was further reaffirmed by the passage in 1978 of what has come to be known as the "Padavan Law" (L.1978, ch. 468, codified in Mental Hygiene Law, § 41.34), which established site selection procedures for community residences. As the Legislature declared: "It is the intention of this legislation to meet the needs of the mentally disabled in New York state by providing, wherever possible, that such persons remain in normal community settings, receiving such treatment, care, rehabilitation and education as may be appropriate to each individual." (L.1978, ch. 468, § 1.) This policy statement was echoed by Governor Carey in approving the bill:

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"The national movement toward providing care and treatment for the mentally disabled in the least restrictive environment consistent with their needs has generated a great demand for community residential facilities for persons formerly served in State institutions.

* * *

"These bills clearly comprise the most important mental hygiene legislation of this session. It is my earnest hope that they will assist the State government, acting through its various agencies, to forge a new partnership with local governments, consumers and providers in developing the type of network of community services that was envisioned when this nation moved away from the back wards and towards the least restrictive environment." (McKinney's Session Laws of N.Y., 1978, pp. 1821-1822.) In approving another bill passed in 1980 providing funding for more community residences (L.1980, ch. 809, codified in Mental Hygiene Law, § 41.36), Governor Carey reiterated that "residential services are essential to the State's efforts to end inappropriate placement of mentally disabled persons in large institutions and to provide homes for mentally disabled persons who have never been institutionalized." (McKinney's Session Laws of N.Y., 1980, p. 1907.)

As late as last month, Governor Cuomo stressed in his message to the legislature that the State remains dedicated to a program of deinstitutionalization and placement of mentally disabled persons in community residences, and that "additional efforts are required to ensure the availability of structured residential settings for all individuals unable to function independently in the community." (Message to Legislature, pp. 49-50 [Jan. 4, 1984].)

Thus, the consistent, unequivocal legislative and executive pronouncements over the past 30 years leave no doubt that it is

an important State policy to deinstitutionalize mentally and developmentally retarded individuals, and to house and teach them in "community residences" such as the one now maintained at 3 Johns Hollow Road, in Crane Neck.

Even more directly pertinent to the present issues is the enactment of subdivision (f) of section 41.34 of the Mental Hygiene Law. Section 41.34 was added to the Mental Hygiene Law in 1978 to provide for a fair distribution of community residences and to bring municipalities into the process of site selection, thereby minimizing resistance and avoiding legal battles that had impeded the community residence program.[3] The latter concern was a very real one as attempts to develop community residences and similar group homes in some areas had met with resistance in the form of injunctive actions based upon local ordinances limiting the use of property to single-family residences.[4] In an

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[3](L. 1978, ch. 468, § 1.) Indeed, the parties to this litigation invoked the procedures provided by section 41.34 of the Mental Hygiene Law. Upon receiving notice of the site selection within Crane Neck, a public hearing was convened by the Village Trustees of Old Field, after which the village formally objected to the proposed community residence. Following a hearing conducted by the representative of respondent. Department of Mental Retardation and Developmental Disabilities, the commissioner supported the decision to establish a community residence at 3 Johns Hollow Road, finding that the facility would not substantially alter the nature and character of the area. This decision was sustained in an article 78 proceeding brought by the village (*Incorporated Vil. of Old Field* v. *Introne*, 81 A.D.2d 906, 441 N.Y.S.2d 418), after which the lease was signed.

[4](See, e.g., *Little Neck Community Assn.* v. *Working Organization for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364, mot. for lv. to app. den. 40 N.Y.2d 803, 387 N.Y.S.2d 1030, 356 N.E.2d 482; and *Incorporated Vil. of Freeport* v. *Association for Help of Retarded Children*, 94 Misc.2d 1048, 406 N.Y.S.2d 221, affd. 60 A.D. 2d 644, 400 N.Y.S.2d 724.)

effort to keep such legal challenges from frustrating the program, the Legislature provided as follows in the concluding subdivision of section 41.34 of the Mental Hygiene Law: "(f) A community residence established pursuant to this section and family care homes shall be deemed a family unit, for purposes of local laws and ordinances."

While the statute is limited to local laws and ordinances, this provision cannot be read without reference to the purpose that engendered it. A major purpose of section 41.34, and the very purpose for which subdivision (f) was enacted, was to eliminate the legal challenges that were impeding implementation of the State policy. (See *Zubli* v. *Community Mainstreaming Assn.*, 102 Misc. 2d 320, 327, 423 N.Y.S.2d 982, affd. 74 A.D.2d 624, 425 N.Y.S.2d 263, mod. on other grounds 50 N.Y.2d 1024, 431 N.Y.S.2d 813, 410 N.E.2d 746.) The concern, as evident in the letters and memoranda contained in the Governor's bill jacket, was to put an end to disruptive litigation over the location of community residences within "family" housing zones. In approving the bill that became section 41.34, Governor Carey stated that: "[T]he bill aims to facilitate the establishment of community residences by discouraging frivolous legal challenges that have needlessly delayed proper establishment of such facilities in the past, at great cost to the litigants. This legislation attempts to encourage a process of joint discussion and accommodation between the providers of care and services to the mentally disabled and representatives of the community, rather than legal antagonism." (McKinney's Session Laws of N.Y., 1978, p. 1821.)

The fact that subdivision (f) speaks of "local laws and ordinances" thus reflects only the particular grounds that historically had been invoked to block placement of community residences, and not a deliberate substantive limitation by the

Legislature. Private covenants restricting the use of property to single-family dwellings pose the same deterrent to the effective implementation of the State policy as the local laws and ordinances that had actually been the subject of the legal challenges. Given the avowed purpose of this law, we conclude that the Legislature did not enact subdivision (f) to erase the impediment resulting from single-family requirements found in laws and ordinances while leaving it intact in private covenants, and that the subdivision applies to such deed restrictions as well.

The legislative intent to remove barriers based on "family" restrictions, whether contained in local laws, ordinances or private covenants, is further illuminated by a comprehensive report issued on the heels of adoption of section 41.34 by the Senate Mental Hygiene and Addiction Control Committee, and authored by its chairman, Senator Frank Padavan, for whom the law is named. (New York State Mental Hygiene and Addiction Control Committee, "Site Selection of Community Residences for the Mentally Disabled: Historical Perspective and Legislation" [April, 1979].) In a section entitled "Zoning and Legal Issues," it is explained that many methods of litigation have been used by communities to block the establishment of such community residences and that, because of their availability, "special use permits and restrictive zoning ordinances have become the most relied upon method." (*Id.*, pp. 25-26.) Such litigation frustrates the State's program:

"Selection of community residence sites have often followed 'the path of the least resistance'.

* * *

"The fact that some neighborhoods have a relatively high concentration of community residents is unfair to those neigh-

borhoods who have been chosen to carry the weight of the community's responsibility for the mentally disabled. It is equally counter productive to the goals of community care movement which strives for 'normal settings' and not mental hygiene ghettos that act as little more than mini-institutions. Furthermore, community residence sites that are inappropriate to the residents are selected in commercial zones when housing in 'transitional neighborhoods' is not available." (*Id.*, pp. 26-27.)

After examining the cases that had been brought to enjoin the placement of group homes—all of which were, like *Ferraioli*, based upon local laws and ordinances—the committee stated that "with this legal climate in mind," it had drafted legislation with an aim "to lessen the amount of litigation involved in siting community residences." (*Id.*, p. 31.) As the committee explained

"Regardless of the source of the suits, they served only to polarize the community, spend taxpayers' money and delay the inevitable location of the group home. This process was of little value to any of the interested parties.

"The end product was a bill, now law, which fully satisfied no single party of interest. It did, however, establish a formal process involving community input and the right to suggest alternative sites. It also made clear the principle that any community residence established in accordance with its provisions would be deemed a single family unit, hopefully reducing litigation over this question." (*Id.*, p. 32.)

It is clear from this report that, while the Legislature fixed on local laws and ordinances because those had been the source of prior legal challenges, the intention in adopting the legislation was to eliminate litigation "regardless of the source" by

simply declaring a community residence to be a single-family unit.

Subdivision (f) "must be read with the legislative goal in mind so that * * * gaps in the law may be resolved in accordance with the legislative scheme." (*Matter of Pell* v. *Coveney*, 37 N.Y.2d 494, 496, 373 N.Y.S.2d 860, 336 N.E.2d 421.) The rule of construction that specific mention of one thing impliedly excludes others is not "anything more than an aid to construction and 'must not be utilized to defeat the purpose of an enactment or to override the manifest legislative intent' ". (*Matter of John P.* v. *Whalen*, 54 N.Y.2d 89, 96, 444 N.Y.S.2d 598, 429 N.E.2d 117.) The purpose and history of subdivision (f) establish that it was enacted to eliminate litigation adversely affecting the State's program by challenging the "family" status of a community residence. In such circumstances, we must "construe the act in question so as to suppress the evil and advance the remedy." (*Matter of Sullivan Co.* [*Miller*], 289 NY 110, 114, 44 N.E.2d 387.)

Since the State's policy regarding placement of the mentally disabled as set forth in subdivision (f) would be frustrated by enforcement of the restrictive covenant, it cannot as a matter of public policy be enforced against the community residence at 3 Johns Hollow Road.

IV

Appellants urge that this court may not refuse to enjoin violation of the restrictive covenant on public policy grounds because it is a private contract which cannot be impaired by the State absent emergency circumstances not present here. (U.S. Const., art. I, § 10; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S.

398, 54 S.Ct. 231, 78 L.Ed. 413.)[5] Appellants' argument, however, misconstrues the law.

Although the language of the contract clause is facially absolute, this court has long recognized that the State's interest in protecting the general good of the public through social welfare legislation is paramount to the interests of parties under private contracts, and the State may impair such contracts by subsequent legislation or regulation so long as it is reasonably necessary to further an important public purpose and the measures taken that impair the contract are reasonable and appropriate to effectuate that purpose. (*Matter of Subway-Surface Supervisors Assn.* v. *New York City Tr. Auth.*, 44 N.Y.2d 101, 109-112, 404 N.Y.S.2d 323, 375 N.E.2d 384; *Matter of Farrell* v. *Drew*, 19 N.Y.2d 486, 493-494, 281 N.Y.S.2d 1, 227 N.E.2d 824; *Matter of Department of Bldgs.* [*Philco Realty Corp.*], 14 N.Y.2d 291, 297-298, 251 N.Y.S.2d 441, 200 N.E.2d 432.)

While older cases such as *Blaisdell* (many of which concerned depression-era legislation prohibiting foreclosure of mortgages or other debts) may have suggested that some emergency requiring temporary State action should be present in order to allow impairment of contract rights, this is clearly no longer the law. "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation * * * such as the remedy-

---

[5]Although section 10 of article I is directed at legislative impairment, and mere impairment of an existing contract by a court order would not necessarily run afoul of that constitutional prohibition (*Barrows* v. *Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 91 L.Ed. 1586), where a court order is based on and gives force or effect to a legislative enactment, there is an impairment within the terms of the contract clause (*Columbia Ry.* v. *South Carolina*, 261 U.S. 236, 244-245, 43 S.Ct. 306, 308, 67 L.Ed. 629).

ing of a broad and general social or economic problem * * * Furthermore, since *Blaisdell,* the court has indicated that the public purpose need not be addressed to an emergency or temporary situation." (*Energy Reserves Group* v. *Kansas Power & Light Co.,* 459 U.S. ____, ____, 103 S.Ct. 697, 705, 74 L.Ed. 569, 581; see, also, *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234 249, n. 24, 98 S.Ct. 2716, 2725, n. 24, 57 L.Ed. 2d 727.)

Here the State's interest in protecting the welfare of mentally and developmentally disabled individuals is clearly an important public purpose, and the means used to select the sites for community residences are reasonable and appropriate to effectuate the State's program of providing the most effective care in the least restrictive environment. In such circumstances, appellants' private contract rights may not override State policy.

V

Since public policy prohibits enforcement of the restrictive covenant against the "community residence" at 3 Johns Hollow Road, appellants' action seeking to enjoin such use was properly dismissed. Accordingly, the order of the Appellate Division should be affirmed, with costs.

COOKE, C.J., and JASEN, JONES, WACHTLER and MEYER, JJ., concur.

SIMONS, J., taking no part.

Order affirmed, with costs.

Judgment of the New York Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

Remittitur

80-17312

2 No. 13

CRANE NECK ASSOCIATION, INC., *et al.*,
Appellants,

against

NYC/LONG ISLAND COUNTY SERVICES GROUP, *et al.*,
Respondents, et al., Defendants.

The appellant(s) in the above entitled appeal appeared by Pelletreau & Pelletreau, Esqs.;

the respondent(s) appeared by Hon. Robert Abrams, Attorney General.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Kaye. Chief Judge Cooke and Judges Jasen, Jones, Wachtler and Meyer concur. Judge Simons took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Suffolk County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 23, 1984

Notice of Appeal to the Supreme Court of the United States dated May 9, 1984 with affidavits of service annexed

COURT OF APPEALS

STATE OF NEW YORK

CRANE NECK ASSOCIATION, INC.; ARTHUR L. DOUGLAS, JR.; CATHERINE CHILDS; EVERSLEY CHILDS OGDEN; MARGHERITA A. FIDAO; CHARLES H. COPELAND; ARTHUR WEEKS and RUTH WEEKS; KEVIN HANLON and JO ANN HANLON; MARION PERLES; MARION HOMIRE; HIROSHI TAKAHASHI and YOSHIKO TAKAHASHI; PHILIP ERHORN; LAWRENCE FORSDICK and NANCY FORSDICK; CHARLES A. FORSDICK; ARTHUR BELDER and ANNE BELDER; ARTHUR R. FORSDICK; RENATTE HAKIM-ELAHI; ROBERT GORDON and IDA GORDON; H. WILLARD GRAY and BARBARA GRAY; HARVEY KRAMER; GERTRUDE STEWART; CHARLES WURSTER and EVA WURSTER; SHERRI ANN TISCH; H. TREBLING BURNARD and MARGARET BURNARD; ARTHUR AUFSES and HARRIET AUFSES; JANE PERKINS; WILLIAM MILHAVEN and BARBARA MILHAVEN; DOROTHY GRAF; JAMES HURLEY and HELENE HURLEY; BRUCE SULLIVAN and MARGARET SULLIVAN; ANNA L. HARTZELL; MAXIME C. FIDAO; WALTER EICHACKER and JANET EICHACKER; YANG S. LU and GRACE LU,

Plaintiffs-Appellants,

—against—

NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Defendants-Respondents.

Suffolk County Clerk's Index No. 80-17312

Notice of Appeal to the Supreme Court of the United States dated May 9, 1984 with affidavits of service annexed

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that the above-named plaintiffs-appellants hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York dated February 23, 1984, which affirmed an order of the Appellate Division of the New York State Supreme Court, Second Judicial Department, granting summary judgment to the defendants-respondents.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: Melville, New York
May 9, 1984

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CAHN WISHOD WISHOD & LAMB
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Notice of Appeal to the Supreme Court of the United States dated May 9, 1984 with affidavits of service annexed

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STATE OF NEW YORK

SS.:

COUNTY OF SUFFOLK

I, ROBERT H. COHEN, being sworn, say: I am not a party to the action, am over 18 years of age and reside at 219-82 64th Avenue, Bayside, New York.

On the 9th day of May, 1984, I served the within Notice of Appeal by delivering a true copy thereof personally to each person named below at the address indicated.

The Office of the Attorney General
of the State of New York
Attorney for NYC/Long Island County
Services and State Defendants-
Respondents
2 World Trade Center
New York, New York 10047

ROBERT H. COHEN

Sworn to before me this
9th day of May, 1984

BARBARA A. PEDERSEN
Notary Public

Notice of Appeal to the Supreme Court of the United States dated May 9, 1984 with affidavits of service annexed

STATE OF NEW YORK

SS:

COUNTY OF SUFFOLK

I, RICHARD C. CAHN, being sworn, say: I am not a party to the action, am over 18 years of age and reside at 9 Rough Riders Court, Huntington, New York.

On the 9th day of May, 1984, I served the within Notice of Appeal by delivering a true copy thereof personally to each person named below at the address indicated.

MORTON WEBER, ESQ.
Attorney for Defendants-Respondents
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Melville, NY 11747

Sworn to before me this
9th day of May, 1984

RICHARD C. CAHN

BARBARA A. PEDERSEN
Notary Public

Order of Thurgood Marshall, Associate Justice, dated May 15, 1984, extending appellants' time for docketing appeal to July 2, 1984.

SUPREME COURT OF THE UNITED STATES

No. A-917

CRANE NECK ASSOCIATION, INC., *et al.*,

Appellants,

against

NYC/LONG ISLAND COUNTY SERVICES GROUP, *et al.*,

ORDER

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby extended to and including July 2, 1984.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 15th day of May, 1984

No. 83-2157

Office - Supreme Court, U.S.
FILED
JUL 27 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

CRANE NECK ASSOCIATION, INC.; ARTHUR L. DOUGLAS, JR.; CATHERINE CHILDS; EVERSLEY CHILDS ODGEN; MARGHERITA A. FIDAO; CHARLES H. COPELAND; ARTHUR WEEKS and RUTH WEEKS; KEVIN HANLON and JO ANN HANLON; MARION HOMIRE; HIROSHI TAKAHASHI and YOSHIKO TAKAHASHI; PHILIP ERHORN; LAWRENCE FORSDICK and NANCY FORSDICK; CHARLES A. FORSDICK; ARTHUR BELDER; ARTHUR R. FORSDICK; RENATTE HAKIM-ELAHI; ROBERT GORDON and IDA GORDON; H. WILLARD GRAY and BARBARA GRAY; HARVEY KRAMER; CHARLES WURSTER and EVA WURSTER; SHERRI ANN TISCH; H. TREBLING BURNARD and MARGARET BURNARD; ARTHUR AUFSES and HARRIET AUFSES; JANE PERKINS; WILLIAM MILHAVEN and BARBARA MILHAVEN; DOROTHY GRAF; JAMES HURLEY and HELENE HURLEY; BRUCE SULLIVAN and MARGARET SULLIVAN; ANNA L. HARTZELL; MAXIME C. FIDAO; WALTER EICHACKER and JANET EICHACKER; YANG S. LU and GRACE LU,

Appellants,

against

NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellees.

On Appeal from the New York Court of Appeals

MOTION OF APPELLEES NYC/LONG ISLAND COUNTY SERVICES GROUP AND NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES TO DISMISS APPEAL OR AFFIRM JUDGMENT ON APPEAL

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No. 83-2157

IN THE

Supreme Court of the United States

October Term, 1983

CRANE NECK ASSOCIATION, INC.; ARTHUR L. DOUGLAS, JR.; CATHERINE CHILDS; EVERSLEY CHILDS ODGEN; MARGHERITA A. FIDAO; CHARLES H. COPELAND; ARTHUR WEEKS and RUTH WEEKS; KEVIN HANLON and JO ANN HANLON; MARION HOMIRE; HIROSHI TAKAHASHI and YOSHIKO TAKAHASHI; PHILIP ERHORN; LAWRENCE FORSDICK and NANCY FORSDICK; CHARLES A. FORSDICK; ARTHUR BELDER; ARTHUR R. FORSDICK; RENATTE HAKIM-ELAHI; ROBERT GORDON and IDA GORDON; H. WILLARD GRAY and BARBARA GRAY; HARVEY KRAMER; CHARLES WURSTER and EVA WURSTER; SHERRI ANN TISCH; H. TREBLING BURNARD and MARGARET BURNARD; ARTHUR AUFSES and HARRIET AUFSES; JANE PERKINS; WILLIAM MILHAVEN and BARBARA MILHAVEN; DOROTHY GRAF; JAMES HURLEY and HELEN HURLEY; BRUCE SULLIVAN and MARGARET SULLIVAN; ANNA L. HARTZELL; MAXIME C. FIDAO; WALTER EICHACKER and JANET EICHACKER; YANG S. LU and GRACE LU,

Appellants,

against

NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellees.

On Appeal from the New York Court of Appeals

MOTION OF APPELLEES NYC/LONG ISLAND COUNTY SERVICES GROUP AND NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES TO DISMISS APPEAL OR AFFIRM JUDGMENT ON APPEAL

Appellees, NYC/Long Island County Services Group and New York State Department of Mental Retardation and Developmental Disabilities, move this Court to dismiss

appellants' appeal from a judgment of the New York Court of Appeals, rendered February 23, 1984, which declined to grant an injunction against violation of a private restrictive covenant upon premises presently maintained by said appellees as a community residence for eight mentally disabled persons. The basis of this motion is that the appeal herein is not taken in conformity to 28 USC § 1257(2) in that the judgment of the New York Court of Appeals rests upon an adequate non-federal basis. Further, the appeal does not present a substantial federal question. In the alternative, this Court should affirm the judgment sought to be reviewed on appeal on the ground that the determination of the New York Court of Appeals was correct. Finally, even if the appellants' submission is treated as a petition for certiorari, it should be denied because the questions upon which the determination of the cause depend are not so substantial as to need further review.

The opinion of the New York Court of Appeals is reported at 61 NY2d 154, 460 NE2d 1336, 472 NYS2d 901 (1984), Jurisdictional Statement 26a-41a. The opinion of the New York Supreme Court, Appellate Division, Second Department, is reported at 92 AD2d 119, 460 NYS2d 69 (2d Dept. 1983), Jurisdictional Statement 11a-25a. The decision of the New York Supreme Court, Suffolk County, was not reported but is set forth at Jurisdictional Statement 1a-10a.

Facts

This case involves an action for injunctive and declaratory relief, *inter alia*, to prohibit the State appellees from operating a community residence for mentally disabled persons upon premises located at 3 Johns Hollow Road,

Old Field, New York, upon the grounds that such use violates a recorded restrictive covenant affecting those premises.

In August, 1979, appellee NYC/Long Island County Services Group, an agency of appellee New York State Office of Mental Retardation and Developmental Disabilities (hereinafter OMRDD), acting pursuant to then *Mental Hygiene Law* § 41.34(b)(1), notified the chief executive officer of the Incorporated Village of Old Field of its interest and intent in establishing the residence and, pursuant to the statute, sent the Village a detailed fact sheet on the residence. On September 24, 1979, the Village registered a formal objection to the establishment of the residence pursuant to then *Mental Hygiene Law* § 41.34(b)(1). As a result, a Commissioner's fact-finding hearing at which both the appellee NYC/Long Island County Services Group and the Village presented evidence was held pursuant to then *Mental Hygiene Law* § 41.34(b)(5) on October 26, 1979.

The Commissioner of appellee OMRDD denied the Village's objection on December 13, 1979, determining that the Johns Hollow Road site would not "substantially alter the nature and character of the area" and would be appropriate for a community residence. The Village then commenced a proceeding pursuant to Article 78 of the New York Civil Practice Laws and Rules challenging the Commissioner's determination as not being based on substantial evidence. Thereafter, New York Supreme Court, Appellate Division, Second Department, confirmed the determination and dismissed the proceeding. *Incorporated Village of Old Field*

v. *Introne*, 81 AD2d 906, 441 NYS2d 418 (2d Dept. 1981). That decision was not appealed to the New York Court of Appeals. After the Commissioner's determination, appellee NYC/Long Island County Services Group entered into a lease agreement for the Johns Hollow Road premises with appellees Pool and Grofman.

Shortly thereafter, in September, 1980, appellants, a homeowner association and 48 homeowners, commenced this action against the appellees. The action purported to allege seven causes of action, five of which sought declaratory and injunctive relief and two of which sought monetary damages. As pointed out, *supra*, the appellants sought declaratory and injunctive relief to prohibit the State appellees from operating the community residence in question and to prohibit appellees Pool and Grofman from leasing and renting the property to the State appellees. Against appellees Pool and Grofman, the appellants also sought exemplary damages, attorneys' fees, and the amount of profit Pool and Grofman would realize under the lease on the ground that their leasing of the premises for a community residence for mentally disabled persons "evidences a high degree of moral turpitude." The appellants also sought exemplary damages and other damages "the amount of which cannot be now ascertained" against the State appellees on the ground that the State appellees' action "evidences a wanton, deliberate and reckless disregard for the rights of plaintiffs."

Appellants alleged that the use of the premises as a community residence for mentally retarded persons violated a covenant affecting the property and sought enforce-

ment of the covenant to evict the present residents of the house. The covenant relied upon by the appellants, drafted in 1945, restricted use of the premises to single family dwellings.

All of the appellees answered the complaint and shortly thereafter, appellants, without conducting any discovery, moved for summary judgment. The appellees opposed the motion. The Supreme Court, Suffolk County (*Gerard*, J.), granted appellants partial summary judgment, finding that though the community residence for mentally retarded persons was not a single family dwelling for the purposes of the covenant, questions of fact existed as to waiver, estoppel and whether the character of the neighborhood had changed so as to defeat the object and purposes for which the restrictions were imposed. Appellants' claims for monetary damages were not addressed by the motion or the Court. Jurisdictional Statement 1a-10a. The appellees appealed the court's order.

The Appellate Division, Second Department, unanimously reversed the order of the Supreme Court, Suffolk County, granted summary judgment to the appellees, and dismissed the complaint insofar as it sought injunctive relief. *Crane Neck Association, Inc.* v. *NYC/Long Island County Services Group*, Jurisdictional Statement 11a-25a. Finding that the community residence was a single family dwelling for the purpose of the covenant, the Appellate Division declared that the establishment of the community residence was not violative of the restrictive covenant in question. Moreover, the Appellate Division declared that, as a matter of public policy, a private restrictive covenant could not be enforced to prevent the establishment of com-

munity residences under the Mental Hygiene Law. The Appellate Division did not address appellants' claims for monetary damages.

The appellants appealed to the New York Court of Appeals, and that Court unanimously affirmed the order of the Appellate Division, Second Department. *Crane Neck Association, Inc.* v. *NYC/Long Island County Services Group,* Jurisdictional Statement 26a-41a. The Court of Appeals held that the covenant could not be equitably enforced "because to do so would contravene a long-standing public policy favoring establishment of such residences for the mentally disabled." Jurisdictional Statement 31a, 32a. The Court based its conclusion on statements made and actions taken by both the executive and legislative branches of the New York State government since 1954, as well as on *Mental Hygiene Law* § 41.34(f). The Court of Appeals did not address the appellants' claims for monetary damages.

This appeal is from the judgment of the New York State Court of Appeals. Jurisdictional Statement 42a, 43a-47a.

ARGUMENT

A. There Is an Adequate Non-Federal Basis for the Decision of the New York Court Sought To Be Reviewed.

The narrow issue presented by this case is whether state courts are required to enforce equitably a private restrictive covenant even when it contravenes a long-standing state public policy. Appellants' reliance upon 28 U.S.C.

§ 1257(2) to invoke the Court's appellate jurisdiction is misplaced in that it assumes that the decision of the New York court rests solely upon a holding that § 41.34(f) of New York *Mental Hygiene Law*, declaring community residences for the mentally disabled to be family units, applies to private restrictive covenants. See Jurisdictional Statement 6. A review of the decision challenged here indicates that such a holding was not necessary to the outcome and at most was an alternative holding.* In fact, the New York Court predicated its decision on the holding that the ". . . covenant cannot be *equitably enforced* because to do so would contravene a *long-standing public policy* . . .". Jurisdictional Statement 31a, 32a. (Emphasis added). In support of its holding, the court reviewed the development of the state's public policy citing the pronouncements of four governors, ten legislative enactments, a consent decree entered into by the state and a five-year plan for community placement issued by the state's Department of Mental Hygiene. Jurisdictional Statement 31a-35a. The court then concluded:

> "Thus the consistent, unequivocal pronouncements over the past 30 years leave no doubt that it is an important state policy to deinstitutionalize mentally and developmentally retarded individuals, and to house and teach them in community residences such as the

* While the opinion of the New York Court of Appeals is not totally free from doubt, with respect to its treatment of § 41.34(f) of the New York *Mental Hygiene Law* (Jurisdictional Statement 35a-39a), it would appear, that the Court's discussion was to rebut any suggestion that the statute was inconsistent with the public policy developed over three decades in that it constituted a legislative determination to preserve the effect of private restrictive covenants. The Court of Appeals there reiterated its conclusion that the covenant could not be enforced because to do so would frustrate state public policy. Jurisdictional Statement 39a.

one now maintained at 3 Johns Hollow Road, in Crane Neck." 61 NY2d 163, 460 NE2d 1340, 472 NYS2d 906 (*Kaye*, J.), Jurisdictional Statement 34a, 35a.

Thus, it is clear that the decision below rested upon the traditional principle that equitable relief will not be had where it would contravene public policy. *Romaine* v. *Chauncey*, 129 NY 566, 573 (1892).

B. No Issues Involving the Fifth and Fourteenth Amendments of the United States Constitution Are Presented by this Appeal.

Appellants' Fifth and Fourteenth Amendment claims (Jurisdictional Statement 14-16) are basically untenable for the simple reason that appellants do not approach this Court seeking either just compensation or the due process opportunity to obtain that remedy. Nor did they seek such relief from the highest court in New York but, as here, only presented these perceived federal claims by way of argument in an effort to convince the New York court to grant them equitable relief. In point of fact, the order affirmed by the New York Court of Appeals did not dispose of appellants' two causes of action for money damages but dismissed the complaint only insofar as it sought injunctive relief. Jurisdictional Statement 25a. Thus, the present posture of this case is that the appellants' causes of action for money damages remain undisposed of by the state courts. Ironically, by raising their Fifth and Fourteenth Amendment claims, the appellants demonstrate the flaw in their Contract Clause argument by highlighting the fact that the denial of equitable relief by the state courts did not directly involve the question of what compensation or

damages, if any, might be due appellants for the alleged interference with their property or contract rights. See Jurisdictional Statement 16.

C. There Is No Substantial Federal Question Presented by this Appeal.

Even if it be assumed *arguendo* that the New York court's determination was necessarily based upon a holding that New York *Mental Hygiene Law*, § 41.34(f) prohibits the enforcement of the restrictive covenant rather than relying upon a long-standing important state public policy to preclude equitable relief, that determination should be affirmed. The state appellees contend that an analysis of appellants' asserted contract right, the extent of the alleged impairment thereof and the statute involved clearly indicates that appellants' Contract Clause claims are without merit.

First, it is necessary to determine the extent of appellants' contract right to, and the justification of their expectations of, equitable enforcement of their deed restrictions. Appellants did not enjoy, *ab initio*, a contract right to impose upon a court of equity the mechanical obligation to grant an injunction for every violation of their covenant, *Weinberger* v. *Romero-Barcelo*, 456 US 305, 313 (1982), nor did they have any reason to expect that a court of equity would not pay particular regard for the public consequences in employing the extraordinary remedy of injunction. *Weinberger* v. *Romero-Barcelo, supra,* 312. One year prior to the initial imposition of the restrictive covenants upon parcels in "Crane Neck Farm", this Court in *Hecht Co.* v. *Bowles*, 321 US 321 (1944), observed:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the *public interest* and private needs as well as between competing private claims." 321 US 329, 330. (*Douglas*, J.) (Emphasis added).

See also, *Rondeau* v. *Mosinee Paper Corp.*, 422 US 49, 60 (1975); *Lemon* v. *Kurtzman*, 411 US 192, 200 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 US 375, 386 (1970). Of more ancient vintage in New York is *McCann* v. *Chasm Power Co.*, 211 NY 301 (1914), in which the New York Court of Appeals noted:

> "A court of equity can never be justified in making an inequitable decree. If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficient hand and remit the plaintiff to his legal rights and remedies." 211 NY 305 (*Collin*, J.).

Similarly, in *Forstmann* v. *Joray Holding Co., Inc.*, 244 NY 22 (1926), that court noted:

> ". . . we find that although defendants proceeded with full knowledge of the facts and with notice of plaintiffs' claim, they had good reason to doubt whether . . . equity would enforce such rights as the plaintiffs claimed." 244 NY 32 (*Pound*, J.).

This Court has held that there can be no substantial impairment of contractual rights in the absence of an impairment of the "reasonable expectations" of the parties. *Energy Reserves Group* v. *Kansas Power & Light Co.*, 459

US 400, 416, 421 (1983). Considering the traditional role of courts of equity, any expectation on the part of appellants that their covenant could be perpetually enforced without regard for subsequent legislation advancing a legitimate public purpose would not be reasonable.

Second, there is a serious question as to how substantial the alleged impairment of appellants' contract right is. Of course, the fact that, as pointed out above, such contract right was not without reservation must be considered in assessing the gravity of the impairment. Additionally, the statute complained of excludes but one specific use from the reach of the covenant. Moreover, that statute, in other subdivisions thereof, provides for the protection of the residential character of neighborhoods. *Mental Hygiene Law* § 41.34, subd. (c) pars. (1), (5) formerly subd. (b) pars. (1), (5); subd. (d) formerly subd. (c). Said subdivisions provide for objections to the establishment of a community residence for the mentally disabled upon the ground that the nature and character of the area would be substantially altered and judicial review of the administrative determinations resolving such objections. Both the administrative procedures and judicial review were utilized with respect to the community residence involved in this appeal with the result that a finding that such community residence would not substantially alter the surrounding area was judicially confirmed. *Incorporated Village of Old Field* v. *Introne,* 81 AD2d 906, 441 NYS2d 418 (2d Dept. 1981). It is apparent that the adjustment of the rights and responsibilities of the contracting parties effectuated by the statute was upon reasonable conditions and of a character

appropriate to the public purpose. *Energy Reserves Group* v. *Kansas Power & Light Co., supra,* 412 (1983).

Third, consideration must be given to the statute involved and the legitimate public purpose sought to be advanced thereby. *Mental Hygiene Law,* § 41.34 ". . . is an exercise of the State's police power that sweeps from border to border, affecting all property owners and all municipalities . . .". *Zubli* v. *Community Mainstreaming Associates,* 102 Misc. 2d 320, 335, 423 NYS2d 982, 993 (Sup. Ct. Nassau Co. 1979), *aff'd on opinion below* 74 AD2d 624, 425 NYS2d 263 (2d Dept. 1980), *aff'd as mod.* 50 NY2d 1024, 410 NE2d 746, 431 NYS2d 813 (1980). Thus, the law applies to all regardless of whether they happen to be parties to contracts. See *Exxon Corp.* v. *Eagerton,* —— US ——, ——, 103 S. Ct. 2296, 2306 (1983). Further, *United States Trust Co.* v. *New Jersey,* 431 US 1 (1977), is inapplicable here since this case involves a law of general application and not one aimed at a state contract.

The legislative statement of intent of the statute in issue was set forth in Chapter 468 of the Laws of New York of 1978, § 1, which declares that ". . . mentally disabled persons have the right to attain the benefits of normal residential surroundings . . ." and articulates the legislative intent that ". . . such persons remain in normal community settings receiving such treatment, care, rehabilitation and education as may be appropriate to each individual. . . ." That section further states that ". . . the legislature recognizes the need to avoid, wherever practicable, a disproportionate distribution of community residences and other similar facilities." Clearly, the New York legislature enacted the statute in furtherance of a significant and

legitimate public purpose. *Energy Reserves Group* v. *Kansas Power & Light Co., supra*, 411. In this instance the legislature sought not only to address the state's traditional *parens patria* role with respect to the mentally disabled but also provided a method for insuring the fair distribution of community residences in neighborhoods throughout the state. Parties may not utilize contracts to estop legislatures from enacting laws intended for the public good. *Exxon Corp.* v. *Eagerton, supra*, 103 S. Ct. 2306 note 12.

Viewed in the light most favorable to the appellants, the instant case involves a minimal impairment of a contract right which was not absolute from its inception by a statute of general application designed to advance the broad societal interest of deinstitutionalizing the mentally disabled while avoiding the disproportionate distribution of community residences and affording administrative safeguards against substantial alteration of neighborhoods subject to judicial review.

Conclusion

For All of the Above Reasons this Court Should Dismiss this Appeal and Deny Certiorari or, in the Alternative, Affirm the Judgment Appealed From, With Costs.

Dated: New York, New York
July 26, 1984

Respectfully submitted,

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* The assistance of Michael E. Gottfried, a Summer Law Intern, in the preparation of this submission is gratefully acknowledged.

No. 83-2157 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1983

Office - Supreme Court, U.S.
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CRANE NECK ASSOCIATION, INC.; ARTHUR L. DOUGLAS, JR.; CATHERINE CHILDS; EVERSLEY CHILDS ODGEN; MARGHERITA A. FIDAO; CHARLES H. COPELAND; ARTHUR WEEKS and RUTH WEEKS; KEVIN HANLON and JO ANN HANLON; MARION HOMIRE; HIROSHI TAKAHASHI and YOSHIKO TAKAHASHI; PHILIP ERHORN; LAWRENCE FORSDICK and NANCY FORSDICK; CHARLES A. FORSDICK; ARTHUR BELDER; ARTHUR R. FORSDICK; RENATTE HAKIM-ELAHI; ROBERT GORDON and IDA GORDON; H. WILLARD GRAY and BARBARA GRAY; HARVEY KRAMER; CHARLES WURSTER and EVA WURSTER; SHERRI ANN TISCH; H. TREBLING BURNARD and MARGARET BURNARD; ARTHUR AUFSES and HARRIET AUFSES; JANE PERKINS; WILLIAM MILHAVEN and BARBARA MILHAVEN: DOROTHY GRAF; JAMES HURLEY and HELENE HURLEY; BRUCE SULLIVAN and MARGARET SULLIVAN; ANNA L. HARTZELL; MAXIME C. FIDAO; WALTER EICHACKER and JANET EICHACKER; YANG S. LU and GRACE LU,

Appellants,

-against-

NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellees.

On Appeal from the New York Court of Appeals

MOTION OF APPELLEES JONATHAN POOL AND BERNARD GROFMAN TO DISMISS APPEAL OR AFFIRM JUDGMENT ON APPEAL

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No. 83-2157

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

CRANE NECK ASSOCIATION, et al.,

Appellants,

-against-

NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellees.

On Appeal from the New York
Court of Appeals

MOTION OF APPELLEES JONATHAN POOL AND BERNARD GROFMAN TO DISMISS APPEAL OR AFFIRM JUDGMENT ON APPEAL

Appellees Jonathan Pool and Bernard Grofman move this Court to dismiss Appellants' appeal. In the alternative, appellees Pool and Grofman move this Court to affirm the judgment rendered February 23, 1984 by the New

York Court of Appeals, on which this appeal rests. The basis for this motion is that there has been no final judgment rendered by the New York Court of Appeals; therefore, the necessary predicate for jurisdiction by appeal or certiorari under 28 U.S.C. § 1257 is lacking. This Court also lacks jurisdiction because the judgment of the New York Court of Appeals rests on adequate and independent state common law grounds. In the alternative, this Court should affirm the judgment sought to be reviewed because the determination of the federal question by the New York Court of Appeals was correct.

The opinion of the New York Court of Appeals is reported at 61 N.Y. 2d 154, 460 N.E. 2d 1336, 472 N.Y.S. 2d 901 (1984) and is reprinted in the

Jurisdictional Statement at 26a-41a. The opinion of the New York Supreme Court, Appellate Division, Second Department is reported at 92 AD 2d 119, 460 N.Y.S. 2d 69 (2d Dept. 1983) and is reprinted in the Jurisdictional Statement at 11a-25a. The unreported decision of the New York Supreme Court, Suffolk County, is reprinted in the Jurisdictional Statement at 1a-10a.

The motions filed by the other two appellees, the NYC/Long Island County Services Group and the New York State Office of Mental Retardation and Developmental Disabilities, have fully set forth the facts relevant to this appeal and they need not be restated in detail here.

FACTS

In brief, appellants are landowners in Crane Neck, New York who sued for an injunction and damages for violation by appellees Pool and Grofman of a restrictive covenant in their deed limiting use to single family dwellings. Pool and Grofman had leased their house in Crane Neck to an agency of New York State to be used as a community residence for eight profoundly retarded adults. Under MHL §41.34, the state agency chose the site after local government officials were notified and their views considered. The local government sought and obtained a due process hearing after which the Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities upheld the site selection, finding that the community residence

would not substantially alter the nature and character of the area, which is the standard set forth in § 41.34 (c)(5). The state court affirmed the decision of the Commissioner. Incorporated Village of Old Field v. Introne, 81 A.D. 2d 906, 441 N.Y.S. 2d 418 (2d Dept. 1981).

Appellants also sued, and the trial court granted them partial summary judgment by issuing a declaration that the covenant had been violated. However, the trial court declined to issue an injunction because other issues remained to be decided. On further appeal, the Appellate Division reversed, holding that a community residence would not be inconsistent with the terms of the covenant, and that state public policy would otherwise prohibit its specific enforcement. The New York Court of Appeals affirmed, holding that the

community residence was not a use contemplated by the covenant, but that specific performance of the restrictive covenants should not be awarded because the covenant violated state public policy in favor of deinstitutionalization of the mentally retarded. The Court of Appeals opinion also stated that the Contract Clause of the United States Constitution, art. I, sec. 10, cl. 1, had not been violated by the denial of the injunction.

ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION, EITHER ON APPEAL OR CERTIORARI, BECAUSE NO FINAL JUDGMENT HAS BEEN RENDERED BY THE NEW YORK COURTS

Absent a final judgment by the New York courts, this Court has no jurisdiction, by appeal or certiorari. 28 U.S.C. § 1257. The New York courts have merely held that appellants are not

entitled to injunctive relief to enforce the restrictive covenants against appellees; they have not fully adjudicated appellants' claims for relief. An order by the New York Court of Appeals pursuant to N.Y. Civil Practice Law & Rules, § 5524, has directed that this action be remitted to the Supreme Court, Suffolk County, "there to be proceeded upon according to law." Jurisdictional Statement, 42a.

A. There Are Additional Issues Awaiting Adjudication

This action has been returned to the trial court, in contemplation of possible further proceedings, because of the limited consideration thus far given to the issues appellants raised in their complaint. The amended complaint herein

alleges seven causes of action, all relating to the alleged breach of the restrictive covenants prohibiting use of the Pool-Grofman premises for any purpose other than a single family dwelling. However, only three of these issues have been considered at all by the New York courts: the first two causes of action, which seek injunctive relief against the alleged breach of the restrictive covenants, and the seventh cause of action, which alleges a violation of the Contract Clause, Art. I, Section 10, cl. 1 of the United States Constitution.

Appellants' third and fourth causes of action are specific damages claims. The third is against appellees Pool and Grofman, and seeks exemplary damages of $50,000 for reckless disregard of the restrictive covenants plus any

profit realized by the lease of the property to the NYC/Long Island County Services Group and the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") ("State appellees"). The fourth is against the State appellees and seeks $50,000 exemplary damages for inducing a breach of the restrictive covenants by Pool and Grofman. The fifth and sixth causes of action allege that the State appellees have taken appellants' property without just compensation, in violation of the New York State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Because the proceeding that reached the New York Court of Appeals, and that is now before this Court, was an

interlocutory appeal arising from a motion by appellants for summary judgment, neither appellants' specific damages claims nor their "taking" and "just compensation" claims ever were considered by the New York courts. The trial court issued a memorandum decision, Jurisdictional Statement, 1a-10a which in effect was a declaratory judgment that the use of the Pool-Grofman premises for a community residence was not consistent with the restrictive covenants. However, the trial court did not award appellants any relief, finding that

> there still exist questions of fact that can only be resolved after further discovery and a trial concerning whether the plaintiffs have waived their rights under the covenant by violating the covenant themselves or whether they should be estopped

> from enforcing the restrictive covenant due to laches or previous acquiescence in violations thereof. There is also a defense raised that the character of the neighborhood has so changed as to defeat the object and purposes for which the restrictions are imposed.

Jurisdictional Statement, 9a-10a.

No trial on these issues has ever occurred. Instead, appellees sought an immediate interlocutory appeal to the Appellate Division, see N.Y. Civil Practice Law & Rules, § 5701, which reversed the trial court and declared there had been no violation of the restrictive covenants. The Appellate Division, on the grounds of New York public policy, also dismissed the complaint "insofar as it seeks injunctive relief." Jurisdictional Statement, 25a.

On further appeal by appellants, the New York Court of Appeals affirmed the Appellate Division order denying injunctive relief, although on different grounds. The Court of Appeals found that the covenants had been violated but that "[s]ince public policy prohibits enforcement of the restrictive covenants against the community residence at 3 Johns Hollow Road, appellants' action seeking to enjoin such use was properly dismissed." Jurisdictional Statement, 41a. Thus the opinion of the Court of Appeals made clear that the decision related solely to injunctive relief.

This record in this action makes clear how far this proceeding is from a final judgment. If appellants continue to pursue this action

(1) the trial must determine

whether appellants have waived their rights, if any, under the restrictive covenants by their own violation thereof.

(2) the trial court must determine whether appellants have previously acquiesced in the violations of the restrictive covenants.

(3) the trial court must determine whether the Crane Neck neighborhood has changed in character to the extent that the restrictive covenants' objects and purposes are no longer enforceable, a defense to the action granted by New York law. N.Y. Real Prop. Acts. § 1951.

(4) the trial court must determine whether a "taking" of property has occurred, and if so, the amount of compensation to be awarded.

B. This Case Does Not Fall Into The Special Categories Where This Court has Reviewed State Court Decisions Lacking Complete Finality

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), this Court summarized four categories of cases "in which the Court has treated the decision of the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." Id. at 477. But this Court

expressly noted that "[i]n most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date...." Id.

This action presents the precise circumstances identified in Cox where interlocutory appellate review is inappropriate. A decision by this Court on the federal issue decided by the New York Court of Appeals, the Contract Clause issue, would leave unresolved the other federal claim of plaintiffs, the issue of whether there has been a taking of plaintiffs' property without just compensation.

"[F]urther proceedings are necessary to resolve the federal question whether there has been a taking at all.

The [State] court's decision, therefore, is not final, and [this Court is] without jurisdiction to review it." San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 633 (1980). Moreover, consideration of the taking issue alone, absent a further determination of the compensation that is constitutionally due, will not yield a final judgment. Id. quoting North Dakota Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 163 (1973). See also Cox Broadcasting Corp., supra, 420 U.S. at 477 n.6.

This Court also noted in Cox that the four special categories apply where "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice'." Id. at 477-78. However, none of the exceptions per-

mitting immediate review is present here. Even if this Court reversed on the Contract Clause issue, appellants would not gain any immediate relief. As outlined above, several other issues still have to be litigated before appellants' entitlement to any relief can be established.

As to the four categories themselves, none is applicable herein. The first category is based on 'practical finality', i.e. that the decision on the federal claim is as a practical matter conclusive of the case because the party asserting the claim has no other grounds upon which to rest his case. Id. at 479. This exception has been reserved for cases in which a single federal issue has been raised, see e.g., Mills v. Alabama,

384 U.S. 214 (1966); cf Minnick v. Calif. Dep't of Corrections, 452 U.S. 105 (1981), and where the remaining procedures would be "mere formal gestures." Mills v. Alabama, supra, 384 U.S. at 217. This exception is inapplicable because, as already noted, there are other federal questions -- most notably the taking and just compensation issues -- that remain and can only be decided after a full trial.

The second category involves cases where "[t]he federal issue finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." Cox Broadcasting Corp., supra, 420 U.S. at 480. This exception has been applied where "[n]othing that could happen [in the subsequent state-court proceedings] would

foreclose or make unnecessary decision on the federal question." Id.; see e.g. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). In this action, by contrast, the remaining issues not yet litigated present a number of opportunities for appellants to obtain relief sufficient to convince them to abandon their Contract Clause claim. Although appellees do not concede appellants' entitlement to such relief, if such a decision were obtained through the litigation process it would certainly remove their incentive to press the existing federal claim.[1]

1. See Note, "The Finality Rule for Supreme Court Review of State Court Orders," 91 Harv.L.Rev. 1004, 1006 (1978)("Indeed, postponing appellate consideration increases the possibility that challenged rulings will not be appealed because subsequent events at trial may remove the incentive for one or more parties to press for review.").

In the third category are cases in which if the party seeking review loses on the merits, "the governing state law would not permit him again to present his federal claims for review." Cox Broadcasting Corp. supra, 420 U.S. at 481. Appellants have not cited any New York law which would preclude them from reasserting their Contract Clause claim so as to preserve it for review by this Court and counsel for appellees' Pool and Grofman do not know of any such barrier. Moreover, after a trial, the completed case "can be submitted for review within the context of a developed factual record [with] the articulated reasoning and legal conclusions of the trial judge." Note, supra, 91 Harv. L. Rev. at 1006; see also Minnick. v. Calif. Dep't. of Corrections, supra, 452 U.S. at 120.

The fourth category of cases applies where

> the party seeking review might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the State court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings yet to come.

Cox Broadcasting Corp., supra, 420 U.S. at 482-83.

In addition, this category applies only to cases where "a refusal to immediately review the state-court decision might seriously erode federal policy." Id.

This exception is in applicable because appellants do not seek to preclude a possibly unnecessary state court trial cf. id. at 482-484. On the contrary, they seek to permit further litigation of their claims for strict enforcement of the covenants.[2] Moreover no important federal policy will be eroded if interlocutory appellate review is denied. Appellants have no federal constitutional right to an injunction

2. In addition, a reversal by this Court will not automatically entitle appellants to an injunction prohibiting further use of the Pool-Grofman premises as a community residence. Thus, a reversal of the Contract Clause issue will not place this action within the first Cox exception. See text supra at 17-18. Rather, the trial court already has identified the substantial barriers appellants must overcome before such relief could be awarded. Jurisdictional statement, 9a-10a.

strictly enforcing their covenant. Appellants also never moved for any immediate relief on the theory that they would suffer irreparable harm by a delay. cf., National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) (per curiam). Indeed, the findings of the trial court, Jurisdictional Statement, 9a-10a, belie any suggestion that denial of immediate review would cause appellants any special harm. (See also Incorporated Village of Old Field v. Introne, 81 A.D. 2d 906, 441 N.Y.S. 2d 418 (2d Dept. 1981), discussed infra at __.)

This case does not fall into any of the special categories enumerated in Cox Broadcasting Corp. As there is no final judgment, this Court lacks jurisdiction to review the decision of the New York Court of Appeals at this

time.

POINT II

THE DECISION BELOW RESTED ON GROUNDS OF PUBLIC POLICY AND NOT NECESSARILY ON ANY NEW YORK STATUTE. ACCORDINGLY, (1) THE DECISION INVOLVED NO "LEGISLATIVE IMPAIRMENT" AND DID NOT REQUIRE A DETERMINATION OF APPELLANTS' CONTRACT CLAUSE CLAIM; (2) THERE IS NO JURISDICTION HERE ON APPEAL AS THE DECISION BELOW DID NOT NECESSARILY DRAW INTO QUESTION THE VALIDITY OF A STATUTE OF THE STATE

The Judicial Code, 28 U.S.C. § 1257, provides for review in this Court of final judgments of claims under the federal constitution, treaties or statutes. Jurisdiction is absent, however, when the decision below rests on adequate and independent state court grounds and the opinion's discussion of federal questions was unnecessary. See Michigan v. Long, 103 S.Ct. 3469, 3474n.4 (1983). In this appeal, looking to the

"four corners of the decision" id. at 3475, the adequacy and independence of the state law ground on which this decision is based is clear, and the decision on the Contract Clause was unnecessary.

The decision of the New York Court of Appeals herein ultimately rested on its determination that the public policy of the state, and not any specific state statute, precludes injunctive enforcement of the restrictive covenants. The opinion of the Court of Appeals concludes by summarizing the holding as follows:

> Since public policy prohibits enforcement of the restrictive covenant against the "community residence" at 3 Johns Hollow Road, appellants' action seeking to enjoin such use was properly dismissed. (emphasis added.)

Jurisdictional Statement, 41a.

Similarly, the court began its discussion of the validity of the restrictive covenants by stating:

> But even if use of the property violates the restrictive covenant, that covenant cannot be equitably enforced because to do so would contravene a longstanding public policy favoring the establishment of such residences for the mentally retarded.

Id. at 31a-32a.

The opinion then continues with a lengthy discussion of executive, judicial and legislative acts which serve as indicia of the public policy and which effectuate that policy, concluding with the statement:

> Thus, the consistent, unequivocal legislative and executive pronouncements over the past 30 years leave no doubt that it is an important State policy

> to deinstitutionalize mentally and developmentally disabled individuals, and to teach them in "community residences" such as the one now maintained ... in Crane Neck.

Id. at 34a-35a.

The opinion of the Court of Appeals at one point speaks in terms that might be construed as directly applying Mental Hygiene Law, § 41.34 (f) to invalidate the restrictive covenants. The Court of Appeals stated:

> Given the avowed purpose of this law, we conclude that the Legislature did not enact subdivision (f) to erase the impediment resulting from single family requirements found in laws and ordinances while leaving it intact in private covenants, and that the subdivision applies to such deed restrictions as well.

Jurisdictional Statement, 37a.

However, in discussing the 1978 statute which added § 41.34 (f) to

Mental Hygiene Law, the Court of Appeals began by stating that "[t]he State policy was further reaffirmed by the passage in 1978 of what has come to be known as the 'Padavan Law'...." (emphasis added). Jurisdictional Statement, 33a.

Thus, the decision below rested on the public policy of the state and not on the Mental Hygiene Law itself. Hence, no determination of the constitutionality of that statute, as contrasted to judicially declared public policy, was necessary in the dispositio n of the appeal before the New York Court of Appeals. Accordingly, there is no issue with respect to the Contract Clause of the United States Constitution, because by its express terms and by judicial interpretation, the Contract Clause applies only to legislative impairments. Barrows v. Jackson,

346 U.S. 249, 260 (1953).

Although the New York Court of Appeals made reference in a footnote to the Contract Clause requirement of a Legislative impairment, Jurisdictional Statement, 40a n.5, it did not expressly decide whether a Legislative impairment had occurred.[3] Rather, the court concluded that the Contract Clause had not been violated because the public policy of the state favoring deinstitutionalization gives effect to important state policies in a manner reasonable and necessary to achieve those ends. Jurisdictional Statement, 40a-41a. This decision was a correct application of the

3. The court's very first sentence in its discussion of the Contract Clause refers to a refusal "to enjoin violation of the restrictive covenant on public policy grounds." Jurisdictional Statement, 39a.

decisions of this Court, see infra at 30-33, but it was unnecessary to a determination of the appeal absent a finding that a Legislative impairment existed.

In addition, since the decision rested on public policy grounds, there is no appealable order here. The decision below did not draw "in question the validity of a statute of a state" on federal grounds. 28 U.S.C. § 1257 (2).

POINT III

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THIS APPEAL

This Court need not perform any Contract Clause analysis of Mental Hygiene Law, § 41.34. See text supra at 24-29. However, upon such review, appellants' claim of a violation of the

Contract Clause is so insubstantial that if this Court were to undertake review, it should summarily affirm.[4] Appellants have not suffered a substantial impairment of their contract. In addition, the New York community residence program implements important state and federal policies in a manner that is both reasonable and necessary to achieve those policy goals. See Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983).

A. There Has Been No Substantial Impairment of Appellants' Contractual Rights

At the time the Crane Neck

4. Appellants' attempt to raise a just compensation claim on this appeal is premature as this claim has not been adjudicated in the state courts. See text supra at 9-10.

restrictive covenants were created, New York had a longstanding policy of regulating land use and of refusing to enforce restrictive covenants when such enforcement would be inequitable. In a review of the restrictive covenants in the context of the Contract Clause, the expectations of appellants must be read to include the contemporaneous state law pertaining to both the subject matter of the covenant and to its enforcement. "This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement was reached." United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977); see also Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 37-8 (1940). In addition, a "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute

a substantial impairment." Energy Reserves Group, supra, 459 U.S. at 411.

This action involves a 1945 covenant restricting the use of land to single family dwellings. Jurisdictional Statement, 2a-3a. However, long before this covenant was written, the subject matter of this covenant, neighborhood land use control, had been held within the police power of the states generally, see Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and of New York in particular. Id. at 390 (citing Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920). The authority to regulate land use had been exercised in New York by means of the state zoning enabling acts, first enacted in

1901.[5] The 1978 amendments to the Mental Hygiene Law establishing the site selection procedures for community residences for the developmentally disabled are but another example in a continuing process of legislative and judicial law-making concerning the use of land in New York State.[6]

The contractual expectations of appellants' predecessor in interest who created the covenants thirty-nine years ago must be read to have anticipated that over the years there would be further

5. See 1901 N.Y. Laws, Ch. 466; N.Y. Gen. City Law, § 20 et seq.; N.Y. Town Law, § 261 et seq.; N.Y. Village Law, § 7-700 et seq.

6. See e.g., N.Y. Envtl. Conserv. Law, § 16-0101 et seq. (flood control); N.Y. Gen. Mun. Law, § 96-a (historic sites preservation); N.Y. Parks & Rec. Law, § 14.01 et seq. (same); N.Y. Unconsol. Laws, § 6251 et seq. (urban development).

reasonable regulation of the use of the affected land. Otherwise, landowners could wholly negate state land use planning by use of restrictive covenants. This Court long ago stated:

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making contracts about them. The contract will carry with it the infirmity of the subject matter.

Hudson Co. v. McCarter, 209 U.S. 349, 357 (1908), cited with approval in the Court's recent Contract Clause cases. See e.g., Exxon Corp. v. Eagerton, 103 S.Ct. 2296, 2305 (1983).

Further, appellants cannot claim any reasonable expectation that New York law would guarantee them specific performance for the breach or impairment of the restrictive covenants. At the

time the covenants were written, and for more than half a century before that date, New York law was clear and unambiguous: the state courts would not enforce restrictive covenants to protect interference of insubstantial value, particularly where enforcement would be inequitable. See e.g., Kew Gardens Corp. v. Ciro's Plaza, Inc., 261 A.D. 2d 576, 580, 26 N.Y.S. 2d 553 (2d Dept. 1941); McClure v. Leaycraft, 183 N.Y. 36, 41, 75 N.E. 961 (1905); Trustees of Columbia Coll. v. Thacher, 87 N.Y. 311, 316-17 (1882). In 1958, the state legislature enacted section 346 of the New York Real Property Law, 1958 N.Y. Laws, Ch. 864 (re-enacted in 1963 as N.Y. Real Property Actions & Proceedings Law, § 1951) to codify the doctrine expressed in these cases that restrictive covenants may be denied equitable enforcement. See generally

Orange & Rockland Util. v. Philwold Estates, Inc., 52 N.Y. 2d 253,264-5, 437 N.Y.S. 2d 291, 296, 418 N.E. 2d 1310 (1981); Commentary, 1958 N.Y. Laws, at 1188. The policy codified in this statute clearly demonstrates that appellants' predecessor in interest could not reasonably expect that equitable enforcement of the covenants would necessarily be granted in future years.

The very statute appellants attack, Mental Hygiene Law, § 41.34, provides appellants additional procedural safeguards not previously available under New York law. Before a community residence may be established, the sponsor must notify the municipality in which it will be located. Id., § 41.34(c). The local government can hold a public hearing, id., § 41.34(c)(2), and can then suggest alternate sites to the one

proposed for the community residence. If the alternate site is equivalent to the one proposed, the local government can compel the sponsor to open the residence at the alternate location. Id., § 41.34(c)(4). The local government can obtain a formal due process hearing before the Commissioner of OMRDD, id., § 41.34(c)(5), and judicial review of the Commissioner's decision is authorized. Id., § 41.34(d). Appellants, as the neighbors of the proposed community residence, obviously could participate in these procedures, including the judicial review of the Commissioner's decision.[7]

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7. See Grasmere Homeowners' Ass'n v. Introne, 84 A.D. 2d 778, 443 N.Y.S. 2d 956 (2d Dept. 1981)(community residence neighbors have standing to challenge Commissioner's decision under § 41.34(d)); Matter of Browe v. Champagne, 97 Misc. 2d 1058, 413 N.Y. S. 2d 103 (Sup. Ct. Rensselear Co. 1979)(same).

Most importantly, Mental Hygiene Law, § 41.34 also continues the substantive common law by providing that the Commissioner cannot approve a community residence site "if he determines that the nature and character of the area in which the facility is to be based would be substantially altered as a result of the establishment of the facility." Id., § 41.34(c)(5). This provision evidences a third reason why no substantial impairment of the covenant has occurred. Before this community residence was permitted to open, the local government requested a hearing and a decision of the Commissioner; his determination that the Crane Neck neighborhood would not be substantially altered was then appealed. The Appellate Division, Second Department affirmed. Incorporated Village of Old Field v. Introne, 81 A.D. 2d 906,

441 N.Y.S. 2d 418 (2d Dept. 1981). Thus, a New York court in a collateral proceeding under the Mental Hygiene Law has found no substantial damage to appellants. The cases cited in the per curiam decision of the Appellate Division, id.,[8] state that aside from conclusory allegations by residents and local officials, no proof was adduced that there would be any substantial alteration of the area, and that such conclusory statements are not sufficient to rebut the substantial evidence supporting the Commissioner's decision.

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8. Town of Hempstead v. Commissioner, 89 A.D. 2d 850, 851, 453 N.Y.S. 2d 32, 33 (2d Dept. 1982); Grasmere Homeowners' Ass'n v. Introne, supra, 84 A.D. 2d at 779, 443 N.Y.S. 2d at 957; Town of Hempstead v. Com'r, State of N.Y., 78 A.D. 2d 677, 678, 432 N.Y.S. 2d 399 (2d Dept. 1980); Town of Greenburgh v. Coughlin, 73 A.D. 2d 672, 423 N.Y.S. 2d 209 (2d Dept. 1979) mot for lv. to app. den. 49 N.Y. 2d 704, 427 N.Y.S. 2d 1025 (1980).

The lack of any substantial impairment is also clear from the very limited scope of the decisions by the state courts herein not to enforce the restrictive covenant. The decision below applies only to the establishment or operation of the one community residence in question. In every other respect the covenants stand, and all use of the properties covered by them remain limited to single family dwellings. The properties may not be used for commercial purposes, for multiple family dwellings or for institutions. As a result, it is clear that there has been no substantial impairment of appellants' contractual rights.

B. The State Courts' Refusal to Enforce the Restrictive Covenants to Prohibit Even A Single Community Residence

for the Developmentally Disabled Gives Effect to Important State and Federal Policies for Deinstitutionalization in a Manner that is both Reasonable and Necessary to Achieve those Policy Goals

The need for New York State to expand upon its 30 year effort of deinstitutionalization and community placement for the developmentally disabled, on which Mental Hygiene Law, § 41.34 is based, see Jurisdictional Statement, 32a-35a, is clearly a "significant and legitimate public policy" seeking to remedy "a broad and general social and economic problem" Energy Reserves Group, supra, 459 U.S. at 411-12. See also Jurisdictional Statement, 41a. The stat ute addresses the need to accommodate tens of thousands of developmentally disabled people who have been,

currently are, or in the next few years will be in need of community based residential placements.

Although New York has the largest community based residential placement program in the nation, the unmet demand for such placements has been and remains overwhelming. Of the estimated 119,000 to 300,000 New York residents who are developmentally disabled, there are approximately 5,000 in community residences and approximately 8,300 in other types of community based settings. N.Y.S. OMRDD, New York State Plan: Mental Retardation and Developmental Disabilities (1984-1987) 43, 188 [Feb. 1984]. In 1983, the total annual budget outlay for community based placements in New York was $ 23,633,000. Id. at 153.

Currently, however, fewer than

one half of the developmentally disabled persons who are in need of community residence places have them. Id. at 188. In the next decade, the gap between the demand for community placements and the available supply is expected to widen. In addition to the existing institutionalized population awaiting community placement, the state has identified approximately 15,000 substantially disabled persons living with their aging parents or siblings who will soon require community residence placements. Id. at 47-8. More than 5,000 others under age 21 who are currently in residential programs operated as part of the special education program in New York State, New York Education Law, §§ 4401 et seq., will require community based placements when their educational entitlement expires. New York State Plan (1984-1987), supra at 47-8. Because of the shortage of appropriate

residential settings or services, the legislature recently authorized funding for them to remain in their existing residential placements as a stop-gap measure. 1983 N.Y. Laws, Ch. 570. In total, by 1991, the demand for community based placements is expected to increase by 31 percent, far outdistancing the estimated growth in supply. New York State Plan (1984-1987), supra at 46, 55.

In addition, the importance attached by the legislature to expansion of New York's deinstitutionalization and community placement efforts is not appropriate for close judicial scrutiny. That legislative judgment is inextricably intertwined with professional judgments concerning the proper setting for the habilitation of the developmentally disabled. "It is not appropriate for courts to specify which of several professionally

acceptable choices should have been followed." Youngberg v. Romeo, 457 U.S. 307, 321 (1982)(quoting id., 644 F.2d 147 178 (3d Cir. 1980)(en banc)(Seitz, C.J. concurring)). The judgments reached by appropriate professionals, and by extension here, the legislative adoption of those judgments into the Mental Hygiene Law, are entitled to a presumption of correctness. Id. at 323.

The statute does not excuse the state from any of its own contractual obligations, cf. United States Trust Co., supra, and because fewer than one-seventh of all community residences in New York are state-operated, Janicki, Mayeda & Epple, "Availability of Group Homes for Persons with Mental Retardation in the United States," 21 Mental Retardation 45, 47 (1983), the statute is not designed to impair private contracts for the state's

advantage. As noted above at 37-39, the statute's main effect is to rationalize the process for community residence site selection; that it may incidentally affect appellants' alleged contract rights does not lessen its legitimacy. See Exxon Corp. v. Eagerton, supra, 103 S.Ct. at 2306.

The inescapable conclusion is that the public purposes underlying Mental Hygiene Law, § 41.34 are both significant and legitimate. Jurisdictional Statement, 41a. The state most clearly is exercising its police power to protect the health and welfare of its developmentally disabled citizens. Zubli v. Community Mainstreaming Associates, 102 Misc. 2d 320, 423 N.Y.S. 2d 982, 993 (Sup. Ct. Nassau Co. 1979) aff'd on opinion below 74 A.D. 2d 624, 425 N.Y.S. 2d 263 (2d Dept.) aff'd as modified 50 N.Y. 2d 1024, 431 N.Y.S.

2d 813, 410 N.E. 2d 746 (1980); Incorporated Village of Old Field v. Introne, 104 Misc. 2d 122, 127, 430 N.Y.S. 2d 192 (Sup. Ct. Suffolk Co. 1980). This interest is not less important than the Minnesota interest in protecting the economic interests of its older citizens, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), or the Kansas or Alabama interests in protecting their consumers of natural gas, see Energy Reserves Group, supra, 459 U.S. at 417; Exxon Corp. v. Eagerton, supra, 103 S.Ct. at 2306.

Equally clear is that any impairment of appellants' contract rights caused by Mental Hygiene Law, § 41.34 "[is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Energy Reserves Group, supra, 459 U.S. at 412 (quoting

United States Trust Co., supra, 459 U.S. at 22). Mental Hygiene Law, § 41.34 "strikes a delicate balance between the needs of the mentally disabled and the concerns of the community in which such residences will be located." New York State Senate Mental Hygiene and Addiction Control Committee, "Site Selection of Community Residences for the Mentally Disabled: Historical Perspective and Legislation" ii [April 1979].[9] That balance is expressed in the site selection procedures which empower municipalities and homeowners to discuss and object to the site of proposed community residences. Mental Hygiene Law, §§ 41.34(b)-(d). The

9. This report, although prepared after enactment of Mental Hygiene Law, § 41.34, was cited approvingly by the New York Court of Appeals as an explanation of the legislature's intent. Jurisdictional Statement, 37a.

right to object -- which had not existed before the statute was enacted, Incorporated Village of Old Field v. Introne, supra, 104 Misc. 2d at 126, 430 N.Y.S. 2d at 195 -- ensures that no municipality or neighborhood will be burdened with an overconcentration of community residences. The statute explicitly prohibits community residences that would substantially alter the nature or character of the area. Mental Hygiene Law, § 41.34(c)(5).

If New York State is to carry out its deinstitutionalization program in an equitable manner, its legislature has concluded that the sponsor s of community residences for the developmentally disabled must have the power to override local zoning laws or restrictive covenants that otherwise would frustrate these efforts. See 1978 N.Y. Laws, Ch. 468,

§1.[10] The state legislature considered

10. The legislatures of 21 other states have reached similar public policy judgments in favor of community residential opportunities for the developmentally disabled. Running through all of these statutes are the same two themes that underlie Mental Hygiene Law, § 41.34: first, that the developmentally disabled and society as a whose will benefit from the creation of small, non-institutional living opportunities; and second, that these living opportunities cause no substantial impact in the neighborhoods in which they are located, and their establishment is a matter of statewide importance that must be given priority over local zoning ordinances and other exclusionary devices. Cal. Welf. & Inst. Code § 5115 (1972 & Supp. 1984); Colo. Rev. Stat. § 31-23-303(2) (1977); Hawaii Rev. Stat. § 333E- 3.5 (Supp. 1983); Ind. Code Ann. § 16-13-21-14 (Burns Supp. 1983); Me. Rev. Stat. Ann. tit. 30 § 4962-A (Supp. 1983-84); Md. Health Gen. Code Ann. § 7-102 (1982 & Supp. 1983); Mich. Comp. Laws Ann. § 125.216a (West Supp. 1984-85); Minn. Stat. Ann. §§ 245.812(3) (1982); 462.357(7) (Supp. 1984); Mont. Code Ann. §§ 53-20-101; 53-20-301 (1983); Neb. Rev. Stat. § 18-1745 (1983); Nev. Rev. Stat. § 278.021 (1983); N.J. Rev. Stat. Ann. § 40:55D - 66.1 (West 1984-85); N.C. Gen. Stat. §§ 168-20; 168-22; 168-23 (1982); Ohio Rev. Code Ann. § 5123.19(D) (Page 1981 & Supp. 1983); R.I. Gen. Laws

the general public support for the goals of community based programs for the developmentally disabled, see Site Selection of Community Residences, supra at 16,

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footnote 10 cont'd from preceding page:

§§ 45-24-22; 45-24-23 (1980 & Supp. 1983); S.C. Code Ann. § 44-21-20 (Law. Co-op 1976); Tenn. Code Ann. § 13-24-102 (1980); Vt. Stat. Ann. tit. 24 § 4409 (1979 & Supp. 1983-84); Va. Code § 15.1-486.2 (1981); Wis. Stat. Ann. § 62-63(i)(3) (West Supp. 1983-84).

In addition, the Arizona, California, Indiana, North Carolina and Wisconsin legislatures have explicitly stated that restrictive covenants will not be enforced to prohibit the establishment of community residences. Of these, only the Arizona and California legislatures were concerned with the retroactive application of their statutes. Ariz. Rev. Stat. § 36-582 (Supp. 1983-84); Cal. Health & Safety Code § 1566-5 (West Supp. 1984); Ind. Code § 16-13-21-14 (Burns Supp. 1983); N.C. Gen. Stat. § 168-23 (1982); Wis. Stat. Ann. § 62.23(i)(3) West Supp. 1983-84). But see Welsch v. Goswick, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982) (holding that the California statute and the state policy on which it rests evidences changed conditions to prevent equitable enforcement of a pre-existing restrictive covenant)

but recognized that some local governments and groups of private citizens will use zoning ordinances or restrictive covenants to resist efforts to place small community residences in their neighborhoods. Id.[11] The result, unacceptable to the New York State legislature, will be a shortageof community placements and a

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11. The legislative committee reported:

> General support for the community movement seems to erode, however, when the discussion moves away from a hypothetical question to the vacant building next door. Thus, the often heard paradoxical statement: "Yes, I support community residences for the mentally retarded, but not in my neighborhood."

Site Selection of Community Residences, supra at 16. See also Adams Cty. Ass'n for Retarded Citizens v. City of Westminster, 196 Col. 79, 580 P.2d 1246, 1250 (Sup. Ct. 1978) ("Clearly [the Colorado statute] was enacted ... to preclude municipalities from barring group homes from neighborhoods on the basis of fears and stereotypes about handicapped persons.")

concentration of community residences along "the path of least resistance:" i.e., in more tolerant areas or in areas in which the residents are poor or otherwise cannot mount expensive legal attacks to the site selected for a proposed community residence. Id. at 26, 27. The legislature especially wanted to prevent the "disproportionate distribution of community residences," 1978 N.Y. Laws, Ch. 468 § 1, which would yield "Mental Hygiene ghettos" in low income neighborhoods. Site Selection of Community Residences, supra at 27. Such a result is both inequitable and will defeat the beneficial purposes to be achieved by providing the developmentally disabled with the "least restrictive environment" that is consistent with their needs. 1978 N.Y. Laws, Ch. 468 § 1.

New York State has chosen to address

these competing interests in a manner that offers both substantive and procedural protections to residents of an area in which a community residence is proposed. By conditioning the establishment of a community residence on a finding that no substantial alteration of the area will occur, the state protects local residents and at the same time fosters the development and fair distribution of community residences throughout the state. Id.

CONCLUSION

For the foregoing reasons, the instant appeal should be dismissed for want of jurisdiction, or the judgment of

the New York Court of Appeals should be affirmed.

Dated: New York, New York
August 23, 1984

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1983

CRANE NECK ASSOCIATION, INC.; ARTHUR L. DOUGLAS, JR.; CATHERINE CHILDS; EVERSLEY CHILDS ODGEN; MARGHERITA A. FIDAO; CHARLES H. COPELAND; ARTHUR WEEKS and RUTH WEEKS; KEVIN HANLON and JO ANN HANLON; MARION HOMIRE; HIROSHI TAKAHASHI and YOSHIKO TAKAHASHI; PHILIP ERHORN; LAWRENCE FORSDICK and NANCY FORSDICK; CHARLES A. FORSDICK; ARTHUR BELDER; ARTHUR R. FORSDICK; RENATTE HAKIM-ELAHI; ROBERT GORDON and IDA GORDON; H. WILLARD GRAY and BARBARA GRAY; HARVEY KRAMER; CHARLES WURSTER and EVA WURSTER; SHERRI ANN TISCH; H. TREBLING BURNARD and MARGARET BURNARD; ARTHUR AUFSES and HARRIET AUFSES; JANE PERKINS; WILLIAM MILHAVEN and BARBARA MILHAVEN; DOROTHY GRAF; BRUCE SULLIVAN and MARGARET SULLIVAN; ANNA L. HARTZELL; MAXIME C. FIDAO; WALTER EICHACKER and JANET EICHACKER; YANG S. LU and GRACE LU,

Appellants,

—against—

NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellees.

MEMORANDUM OF APPELLANTS IN OPPOSITION TO THE APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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Statement

Appellants Crane Neck Association, Inc., *et al.*, submit this memorandum of law in opposition to the separate motions of appellees NYC/Long Island County Services Group and New York State Department of Mental Retardation and Developmental Disabilities (the "State Appellees") and Jonathan Pool and Bernard Grofman ("Pool-Grofman") to dismiss or affirm.

I

The judgment of the Court of Appeals is final for purposes of this Court's jurisdiction.

The facts are not accurately set forth by the Appellees in their motion, who incorrectly state that the Appellate Division of the New York Supreme Court dismissed the complaint only insofar as it sought injunctive relief (State Motion, p. 5; Pool-Grofman Motion, p. 12). On the contrary, that Court's decision (J.S. 11a-25a)[1] and judgment made it clear that the complaint was dismissed in its entirety. The Court of Appeals correctly noted (J.S. 27a) that the Appellate Division had granted total relief to the Appellees:

> The Appellate Division . . . dismissed the complaint, determining that the facility could be considered a single-family dwelling consistent [with] the restrictive covenant, and that in any event the covenant could not be enforced to prevent the residence as a matter of public policy.

Under the State Constitution and statutes (N.Y. Constitution, Art. 6 §3 [McKinney 1969]; *Civil Practice Law and Rules* §§5601, 5611 [McKinney 1978]) the Court of Appeals possessed jurisdiction only because the Appellate Division determination was final and disposed "of all of the issues in the action." Significantly, Appellees failed to move to dismiss the appeal in the Court of Appeals for lack of jurisdiction, and the Court as-

[1]The Jurisdictional Statement will hereinafter be referred to as "J.S."

sumed jurisdiction and decided the matter on the merits. That Court made it clear that no portion of Appellants' case remained following its ruling. In footnote 1 (J.S. 32a), it stated:

> in view of our holding, there is no need to reach the issue of waiver of the restrictive covenant, or what value if any it might have.

Thus, the Court affirmed the order of the Appellate Division without remanding any portion of the case for trial.[2] Moreover, at J.S. 41a, the Court expressly held that "Appellants' private contract rights may not override state policy." A remand for trial would have been without purpose in light of the Court of Appeals' holding, since an award of damages against the State would override state policy.

Thus, the Court of Appeals judgment disposed of all of the issues in the action, and was a final judgment within the meaning of 28 U.S.C. §1257. It is unnecessary to perform an analysis based upon *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 95 S.Ct. 1029 (1978).

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[2]In New York, complaints in declaratory judgment actions are not dismissed but instead the court declares the parties' rights. *Syracuse Savings Bank* v. *Town of DeWitt*, 56 N.Y.2d 671 (1982); *Lanza* v. *Wagner*, 11 N.Y.2d 317 (1962); *Arrow Louver & Damper Corp.* v. *Newsday, Inc.*, 86 A.D.2d 513, 445 N.Y.S.2d 747 (1st Dep't 1982); *Somerset Railroad Corporation* v. *Graham*, 89 A.D.2d 819, 453 N.Y.S.2d 527 (4th Dep't 1982). Hence, in this case the remand pursuant to CPLR § 5524 did not signify further proceedings but was for the purpose of the entry of the Court of Appeals judgment as the judgment of the trial court declaring the rights of the parties. (This was later done.) None of the issues listed by Pool and Grofman (Pool-Grofman Motion, pp. 12-14) survived the Court of Appeals judgment. The Court of Appeals recognized in footnote 1 that, had it not found enforcement of the covenant to be barred, it would have been necessary to reach the issue of "what value if any [the covenant] might have."

II

The judgment of the New York Court of Appeals rests squarely upon rejection of the contract clause claims.

The State Appellees (State Motion, p. 7) argue that the Court of Appeals ruling is "at most" alternatively based upon a holding that Section 41.34(f) of New York *Mental Hygiene Law* applies to restrictive covenants, and that it is primarily based upon the principle that equitable relief will not lie where it would contravene public policy. Appellees Pool and Grofman make no such concession (Pool-Grofman Motion, p. 14).

The Court of Appeals opinion [conceded by State Appellees (Motion to Dismiss or Affirm, p. 7, n.) to be "not totally free from doubt"] makes it clear beyond cavil that the Court regarded Section 41.34(f) to be specifically applicable to private restrictive covenants. The Court held that the statutory language referring to "local laws and ordinances" was "not a deliberate substantive limitation by the Legislature" and that

> the Legislature did not enact subdivision (f) to erase the impediment resulting from single family requirements found in laws and ordinances while leaving it intact in private covenants, and that the subdivision applies to such deed restrictions as well. (J.S. 37a)

The Court described the legislative intent "to remove barriers based on 'family' restrictions, whether contained in local laws, ordinances or private covenants." (J.S. 37a) At J.S. 39a, the Court held that the statute (must be read with the legislative goal in mind so that . . . gaps in the law may be resolved in accordance with the legislative scheme." At J.S. 40a, the Court held that, despite the language of the Contract Clause of the U.S. Constitution,

> the State's interest in protecting the general good of the public through social welfare legislation is paramount to

> the interests of parties under private contracts, *and the State may impair such contracts by subsequent legislation or regulation* so long as it is reasonably necessary to further an important public purpose and the measures taken that impair the contract are reasonable and appropriate to effectuate that purpose. (Emphasis added.)

Finally, at J.S. 40a, n.5, the Court pointed out that "where a court order is based on and gives force or effect to a legislative enactment, *there is an impairment within the terms of the contract clause,*" citing *Columbia Railway* v. *South Carolina,* 261 U.S. 236, 244-245, 43 S.Ct. 306 (1923) (emphasis added).

It is thus clear that the judgment below rests squarely upon the holding that the State had the right to override private contract rights under the circumstances presented by this case, and did so by enacting Section 41.34(f). The court relied upon "longstanding public policy" merely as legislative history, to aid in the construction of Section 41.34(f). The statute was treated as an expression and implementation of state policy. The judgment below inextricably linked the construction of the statute with the application of public policy, so that it is not possible, as the Appellees suggest, to separate the bases of the lower court's holding and conclude that there is an adequate non-federal basis for the judgment appealed from.

III

The Fifth and Fourteenth Amendment claims are preserved for this appeal.

Based upon their erroneous assumption that Appellants' damage action was preserved, the Appellees argue that the Fifth and Fourteenth Amendment claims have not been preserved for this appeal. As noted, *supra,* the New York courts have dismissed Appellants' complaint in its entirety. Even assuming *arguendo*

that two causes of action for money damages had been preserved, no viability would remain in those causes of action in light of the Court of Appeals' flat pronouncement that "Appellants' private contract rights may not override state policy." No damage award could stand consistently with that holding. Thus, Appellants' rights to declaratory and injunctive relief, and to damages, have been rejected by the state courts and the Fifth and Fourteenth Amendment claims are preserved.

IV

There are substantial federal questions presented by this appeal.

The Appellees argue that no substantial federal question is presented because Appellants never possessed a contract right "to impose upon a court of equity the mechanical obligation to grant an injunction for every violation of their covenant." (State Motion, p. 9; see Pool-Grofman Motion, p. 37). Thus, they conclude, the denial of injunctive relief did not significantly impair Appellants' contract rights. This argument erroneously assumes that the impairment of Appellants' contract rights is to be measured only by the New York courts' refusal to grant an injunction. As previously noted, however, Appellants' complaint was in all respects dismissed, and thus Appellants lost any opportunity to seek money damages as well as injunctive or declaratory relief. Contrary to the State Appellees' gratuitous conclusion that "any expectation on the part of the appellants that their covenant could be perpetually enforced without regard for subsequent legislation advancing a legitimate public purpose would not be reasonable," (State Motion, p. 11) we submit that homeowners who purchase their residences in reliance upon contractual covenants assuring a continuity of single-family use have every right to expect that *some* relief will be afforded them in the event of future breach of their contract rights. Deprivation of all relief surely constitutes a substantial contract impairment, particularly

when it is considered that purchase of a home is the single largest legal transaction in the lifetime of most people.

Traditional equitable principles which prevent the making of "an inequitable decree" do not avail the Appellees, not only because all relief—not merely equitable—was denied, but for the additional reason that reference to general principles of equity can never afford to a contracting party notice as to what subsequent circumstances could arise which would cause a court to decide that his attempt to enforce his contract rights would be "inequitable." It is the substantive development of the law—[and, in particular whether regulation has previously occurred in the specific area, *Veix* v. *Sixth Ward Building & Loan Association*, 310 U.S. 32, 60 S.Ct. 792 (1940)]—which shapes a contracting party's expectations with regard to whether the subject matter of his contract is likely to be regulated by the State in the future, and, hence, whether enforcement of his contract rights might be deemed "inequitable" by reason of conflict with State policy. In the absence of any indication that the subject matter of the restrictive covenant at bar would be so regulated, the Appellants had no reason to expect that regulation would occur in this area or that the State would subsequently enact legislation overriding private restrictive covenants for the purpose of establishing community residences in a single-family residential area.[3]

The Appellees also question the substantiality of the impairment of Appellants' contract rights on the ground that the challenged statute "provides for the protection of the residential character of neighborhoods." (State Motion, p. 11; see Pool-Grofman Motion, pp. 37-38). What Appellees overlook is that Appellants were not parties to the prior administrative and judicial proceedings involving the government of the Incorporated Vil-

[3]The argument by appellees' Pool and Grofman (p. 33) that a property owner can reasonably expect no greater protection from a deed restriction than he can from a local zoning ordinance misses the point. Restrictive covenants are entered into for the very purpose of protecting property against the vagaries of zoning action by municipal bodies peculiarly susceptible to political pressures.

lage of Old Field, and were in no manner bound by the result. Thus, the administrative determination by the Appellee New York State Department of Mental Retardation & Developmental Disabilities that the nature and character of the area would not be "substantially altered" by establishment of a community residence—even if it were deemed to be the equivalent of a finding that Appellants' contract rights were insubstantial (which does not necessarily follow)—cannot bind the Appellants.

Appellees argue that there is no substantial federal question presented by this appeal because the statute and public policy upheld by the Court of Appeals implement important state and federal policies in a reasonable manner.[4] They note that the legislatures of 21 states have favored establishment of community residential facilities for the developmental disabled (Pool-Grofman Motion, p. 51, n. 10). They also claim, relying only upon the State Appellees' own statistics, that there are an "estimated 119,000 to 300,000 New York residents who are developmentally disabled" and "fewer than one-half of the developmentally disabled persons who are in need of community residence places have them." (Pool-Grofman Motion, pp. 43-44).

Without commenting on the accuracy of the State's figures (which do not appear in the record of this litigation), the significant legal question is whether community residence legislation can retroactively override contract rights of property owners as embodied in restrictive covenants. As noted by Appellees Pool and Grofman, "the Arizona and California legislatures were concerned with the retroactive application of their statutes" (Pool-Grofman Motion, p. 52, n. 10), and California's legislature expressly declined to apply its statute to deed and other contractual restrictions imposed prior to the enactment of the statute. A California court has avoided the prohibition of the statute

[4]Neither group of Appellees have attempted to show why it is necessary or reasonable for New York, in furtherance of its deinstitutionalization program, to acquire property encumbered by private covenants, since the number of areas limited to single family use by deed restrictions is small (J.S. 13-14).

by declaring a community residence for six or fewer adults to be the equivalent of a single-family dwelling. *Welsch* v. *Goswick*, 130 Cal. App. 3d 398 (1982). The New York Court of Appeals in this case squarely addressed the constitutional issue, expressly applied Section 41.34 of the *Mental Hygiene Law* retroactively, and held that the community residence in question was not a single-family residence and violated the covenant proscribing uses other than single-family uses. The sharp conflict between the manner in which New York and California have dealt with the issue of retroactivity underlines the widespread interest in this issue and provides additional reason for the Court to hear and determine this case. It hardly supports the proposition that no substantial federal question is presented. Nor is that proposition supported by the Appellees' delineation (Pool-Grofman Motion, pp. 12-14) of the issues allegedly remaining in the case: as they so aptly point out, there has never been a trial of these issues—yet they now ask this Court to conclude without such a trial that Appellants possess no substantial federal rights!

CONCLUSION

The motions to dismiss or affirm should be denied and probable jurisdiction noted.

Dated, Melville, New York
August 28, 1984

Respectfully submitted,

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